

When Fantasy Meets the Courtroom: An Examination of the Intellectual Property Issues Surrounding the Burgeoning Fantasy Sports Industry

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With an estimated fifteen million people nationwide participating in fantasy sports games, the fantasy sports industry has grown into one of the greatest cultural obsessions in modern-day America. Despite adding excitement to the lives of sports fans, the fantasy sports craze raises a number of complex intellectual property law issues that are in need of examination. This Note provides an in-depth exploration of the legal doctrines of copyright and the right of publicity and how they should be applied in the context of fantasy sports.

I. INTRODUCTION

What passion does America's favorite *Bat out of Hell*, soft-rocker Meat Loaf, share with Hall of Fame quarterback Dan Marino, perennial Cy Young candidate Curt Schilling, U.S.A. Softball pitcher Jennie Finch,¹ your child's elementary school teacher, the next door neighbor, and an estimated fifteen million other Americans?² Answer: fantasy sports.³ As evidenced by the

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¹ See Chris Ballard, *Fantasy World*, SPORTS ILLUSTRATED, June 21, 2004, at 80.

² See Rob Hurtt, *Get in the Game: Think You Know Football? Put it to Use. Fantasy Leagues Have Something to Offer Every Fan—Even Old-Schoolers*, SPORTING NEWS, Aug. 30, 2004, at 10. According to the Fantasy Sports Trade Association (FSTA), fantasy sports are played by approximately fifteen million people nationwide, with that number expected to continue to rise annually. See Bob Tedeschi, *Advertisers Discover the Value of Young Men with Time and Money to Spend on Fantasy Sports on the Web*, N.Y. TIMES, Aug. 23, 2004, at C7. Contrary to popular belief, with women composing nearly twenty percent of the fantasy participants on NFL.com, fantasy sports are no longer a male-dominated genre. Bill Griffith, *Fantasy Exceeds Wildest Imagination*, BOSTON GLOBE, Dec. 25, 2005, at D7; see also Kevin O'Horan, *Love of Football Puts Gridiron Girls on the Fantasy Field*, SARASOTA HERALD-TRIB., Jan. 15, 2006, at E1 (describing the fantasy football experiences of a group of young women).

³ See Ballard, *supra* note 1, at 82.

shocking number of participants, to posit that the billion dollar⁴ fantasy sports industry is booming would be to grossly understate the outgrowth of this revolutionary sports phenomenon.

Though fantasy sports involve no illicit substances, a growing number of participants find themselves constantly in need of their fantasy "fix." These self-proclaimed "fantasy addicts" cannot resist planning vacations around Internet access so they can update their fantasy rosters,⁵ purchasing electronic devices complete with sports tickers that provide up-to-the-minute statistics,⁶ and even quitting their jobs in order to devote more time to the management of their fantasy teams.⁷ In the words of *Back to the Future* actor and admitted fantasy addict Michael J. Fox:

The game can make you a bit obsessive You'd be in a cab headed to pick up your kids, and you'd hear on the radio that Pedro Martinez just got injured, and you'd be like, Oh, s---! Suddenly you'd forgotten about your kids, and you're trying to figure out a way to trade Martinez before anyone else in your league finds out about the injury.⁸

Fortunately for those who, like Fox, possess an insatiable craving for fantasy sports, in today's Internet world a fantasy league exists for virtually every professional sport. Aside from the "big four" of fantasy baseball, football, basketball, and hockey, a sports fan can dabble in fantasy NASCAR, fantasy golf, fantasy bass fishing, and, oddly enough, fantasy professional wrestling.⁹ As with countless other successful enterprises, the

⁴ See Dave Kindred, *What's the Harm in a Little Fantasy? Lots*, SPORTING NEWS, Aug. 12, 2005, at 60 (citing a 2003 FSTA study reporting that fantasy sports revenues were estimated at \$4 billion).

⁵ See George Winkler, *I'm All Geeked Up: The True Confessions of a Fantasy Junkie*, SPORTING NEWS, Apr. 29, 2005, at 6. Winkler explains that for him, the search for a vacation spot revolves around Internet accessibility and a television set that can be tuned to numerous sports channels at anytime during the day. *Id.*

⁶ See Matt Romig, *For the Novice, Fantasy Sports 101*, YAHOO SPORTS, January 26, 2004, <http://fantasysports.yahoo.com/analysis/news?slug=mr-fantasy101&prov=yahoo&type=lgns&league=fantasy>.

⁷ See Kindred, *supra* note 4, at 60 (reporting on an advertising agent who quit his job to become "semiserious" about fantasy football).

⁸ See Ballard, *supra* note 1, at 86; see also Jason Diamos, *Showtime for Meat Loaf: Fantasy Sports Draft Days*, N.Y. TIMES, Aug. 21, 2005, § 8, at 11 (detailing Meat Loaf's fantasy addiction).

⁹ Ballard, *supra* note 1, at 82; see also MICHAEL HARMON, THE SAVVY GUIDE TO FANTASY SPORTS 17 (2005) (listing fourteen different categories of fantasy sports, and seven additional fantasy games based upon reality television shows). The fantasy craze is not limited to Americans, as is evidenced by the popularity of fantasy cricket and fantasy soccer in European countries. See Mark Wallace, *Living in a World of Make-Believe: The*

Internet Age catapulted the fantasy sports industry from its humble beginnings among a group of friends to its present status as a cultural obsession.¹⁰ However, the expansion and financial success of fantasy sports, and the technological marvels that are now integrated into the industry, raise a number of unique and complex intellectual property law issues that currently remain unresolved.¹¹ Although the legal issues implicated by fantasy sports arguably date back to the rudimentary inception of the games, the professional leagues have now realized the lucrative nature of fantasy sports and appear poised to engage in protracted litigation in order to turn the greatest sports phenomenon in modern-day America into billion dollar revenues for themselves.¹²

The current debate centers around whether player names, statistics, and related information are the intellectual property of the professional leagues and/or their players associations, such that the unlicensed use of this information by members of the fantasy industry constitutes violations of both federal and state law.¹³ The battle over the licensure of fantasy sports was the subject of intense and highly scrutinized federal court litigation in *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media*,

Internet Has Played a Huge Part in the Spread of Fantasy Sports, FIN. TIMES (London), June 1-2, 2002, at 20; Ballard, *supra* note 1, at 82.

¹⁰ See Ben Berentson, *Steinbrenner Wannabes: Here's a Way to Trade Online Without Losing Your Shirt*, FORBES.COM, Sept. 11, 2000, at http://forbes.com/best/2000/0911/038_print.html (quoting Carl Foster, President and CEO of the Fantasy Sports Players Association, as saying, "[t]he Internet has brought fantasy sports out of the closet and has brought a lot of major companies . . . into the industry"). As of 2002, there existed over 30,000 links to websites relating to fantasy sports. Jack F. Williams, *Who Owns the Back of a Baseball Card?: A Baseball Player's Rights in His Performance Statistics*, 23 CARDOZO L. REV. 1705, 1707 (2002). However, in a mere three years that number has catapulted to between fifteen and twenty-two million fantasy sports related websites. See HARMON, *supra* note 9, at 11. Recognizing the effect of fantasy sports on professional athletics, popular ESPN talk show host Jayson Stark listed fantasy baseball as the eighteenth most important innovation in professional baseball. See Jayson Stark, *Top 25 Baseball Innovations*, ESPN.COM, Feb. 13, 2006, <http://sports.espn.go.com/mlb/news/story?id=2328893>.

¹¹ See generally Tresa Baldas, *Play Ball! IP Litigators Take the Field in a New Season of Copyright Disputes*, THE RECORDER, July 21, 2005, at I21. According to one commentator, the growth of intellectual property law has led to increasingly complex litigation involving multiple claims of protection under varying theories. See Michael J. Mrvica, *Article I, Section 8, Clause 8—Copyright Clause—Professional Basketball Games and Related Statistics Are Not Afforded Copyright Protection Pursuant to Federal Copyright Law Promulgated Under the Copyright Clause—National Basketball Association v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997), 8 SETON HALL J. SPORT L. 765, 765 (1998).

¹² See Baldas, *supra* note 11, at I21.

¹³ Williams, *supra* note 10, at 1708; see also Eric Fisher, *Debate over Baseball Stats Isn't a Fantasy*, THE WASHINGTON TIMES, Feb. 11, 2005, at C1, C3.

*L.P.*¹⁴ Despite the recent decision in the *C.B.C.* case, an appeal—as well as additional lawsuits dealing with the collision of fantasy sports and intellectual property law—is highly likely given the novelty and complexity of the legal issues involved.¹⁵ Fantasy experts agree that the resolution of these issues by the courts, including a potential reversal of the *C.B.C.* case, could conceivably reshape the entire fantasy sports industry.¹⁶ Those closest to the litigation have predicted that the unique nature of the legal issues involved could likely merit eventual consideration by the Supreme Court of the United States.¹⁷ Should the professional leagues ultimately prevail on their arguments that fantasy sports must be licensed because player names and statistical information are the intellectual property of the leagues, many of the small fantasy companies who pioneered the use of Internet fantasy sports may be eliminated by the large media entities, such as CBS and ESPN,

¹⁴ *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp.2d 1077 (E.D. Mo. 2006). *C.B.C. Distributing and Marketing, Inc.* has operated a fantasy sports business since 1992 under the brand name of CDM Fantasy Sports (CDM). *See id.* at 1080. At the time of the lawsuit, CDM offered fantasy baseball, football, basketball, hockey, golf and auto racing games. *See* Complaint at ¶ 4, *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp.2d 1077 (E.D. Mo. 2006) (No. 1-1). The suit was filed by *C.B.C.* seeking a declaratory judgment that its operation of fantasy baseball does not infringe upon the intellectual property rights of Major League Baseball Advanced Media (MLBAM), which is the branch of Major League Baseball charged with operating the league's website, MLB.com. *See generally id.* at ¶ 2. Under the terms of its agreement with the individual players, the Major League Baseball Players Association (MLBPA) possesses the sole right to use and license other entities to use the names, likeness, and personas of the baseball players who compose the Association's membership. *See* Memorandum in Support of Major League Baseball Players Association's Motion for Summary Judgment at ii, ¶ 3, *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp.2d 1077 (E.D. Mo. 2006) (No. 45).

¹⁵ *See* Patti Waldmeir, *Baseball Takes a Swing at the Fantasists*, FIN. TIMES (London), Apr. 14, 2005, at 14. According to Waldmeir, "[h]owever the court rules in this morality tale of the internet age, it seems clear that many more such cases will follow." *Id.*

¹⁶ *See* Fisher, *supra* note 13, at C3 (explaining how requiring fantasy sports organizations to be licensed could potentially force the small companies that built the industry to cease operations); *see also* Bill King, *A Real Fight over Fantasy*, STREET & SMITH'S SPORTS BUS. J., Nov. 14-20, 2005, at 18 (discussing the possible implications that the *C.B.C. Distribution* lawsuit may have on fantasy sports as they exist today); Alan Schwarz, *Stats*, LEGAL AFF., Nov.-Dec. 2005, at 23 (hypothesizing that the difficult issues presented in the context of fantasy sports and intellectual property will be "resolved with new and more pragmatic interpretations of the law").

¹⁷ Associated Press, *infra* note 23. Attorney Rudy Telscher, Jr., who represents *C.B.C.* in the federal lawsuit, opined that regardless of the district court's holding "my guess is there is going to be an appeal. It could be a case that ends up in the Supreme Court." *Id.*

who would likely be the recipients of a limited number of licenses.¹⁸ Further buttressing the fatalistic fears of the fantasy sports industry is the fact that in less than one year since requiring the licensure of fantasy games, Major League Baseball has raised its licensure fee by an outrageous \$1,975,000.¹⁹ Additionally, the National Football League has openly stated that in the near future it will both “limit[] the number of [fantasy] licenses severely” and greatly increase the fees involved with fantasy football.²⁰

Unfortunately for fantasy sports organizations and their fifteen million subscribers, the propriety of using player names and statistics implicates the complexities of the frequently litigated and ever evolving law of intellectual property.²¹ It appears unavoidable that the fate of modern-day fantasy sports rests entirely with the courts. Should the courts afford the professional sports leagues the right to require licensing of player names and statistics, the shockwaves that would reverberate across the industry could dramatically curb the fantasy sports enthusiasm of many Americans by severely limiting the available options.²² On the other hand, decisions against the leagues would result in the loss of millions of dollars in licensing fees that the leagues are currently extracting from those companies who have not elected to challenge their demands.²³

¹⁸ See Michael Hiestand, *Fantasy Choices May Narrow*, USA TODAY, Feb. 9, 2005, at C.12. It is possible that if the courts determine that fantasy sports must be licensed, the leagues would concentrate licenses to a limited number of entities in order to generate increased revenue. *Id.*; see also Allan Ryan, *There's Trouble in Fantasy Land*, TORONTO STAR, Jan. 19, 2006, at E03 (noting that baseball's tactics “could be viewed as simply another example of one sport creeping toward exercising total control over every revenue source possible.”). This feared monopolization of licensing strategy has been previously used by the National Football League in granting exclusive licenses to Reebok and Electronic Arts for the purposes of marketing player jerseys and videogames, respectively. *Id.* Many fantasy proponents fear that “if baseball wins, it's going to go from 300 [fantasy companies] down to three, and maybe less.” Associated Press, *Future of Fantasy Sports May Be Decided in St. Louis Court*, BELLEVILLE NEWS-DEMOCRAT, Jan. 13, 2006, at 7D.

¹⁹ See Kurt Badenhausen, *Foul Ball*, FORBES, Feb. 27, 2006, at 52 (reporting that, “this year MLB raised the minimum license fee to \$2 million from \$25,000”).

²⁰ See King, *supra* note 16, at 16.

²¹ See Baldas, *supra* note 11, at 121. According to Baldas, since 2003 nearly a dozen intellectual property lawsuits have arisen in the realm of professional athletics. *Id.* Regarding the collision of intellectual property and sports, Georgia State University College of Law Professor and sports law expert, Jack Williams, stated that we have “just see[n] the tip of the iceberg” in terms of litigation involving sports organizations and intellectual property rights. *Id.*

²² See Hiestand, *supra* note 18, at C.12.

²³ See Associated Press, *Baseball Statistics: History or Property? Fantasy League Company Sues for Free Rights to Batting Averages*, CNN.COM, Jan. 15, 2006, <http://www.cnn.com> (discussing the potential financial impact that a loss in court would

This Note provides an in-depth exploration of the intellectual property law issues presented by the fantasy sports industry. It begins in Part II by providing a brief overview of the history and mechanics behind the operation of a fantasy game; a basic knowledge of the game setup is critical to understanding the legal dilemmas that are currently facing the industry. Next, Part III examines whether fantasy sports organizations have violated federal copyright law as a result of their use of player names and statistics in connection with their fantasy games. In Part IV, the Note moves to the most contentious issue involved in the collision of fantasy sports and intellectual property law: the right of publicity.²⁴ Included in the right of publicity discussion is an examination of possible First Amendment defenses that fantasy sports organizations may have against potential right of publicity claims raised by the leagues. In addition to providing an overview of the relevant law, both the copyright and right of publicity discussions conclude with analyses and recommendations for how the courts should apply the existing legal doctrine in the realm of fantasy sports litigation.

II. THE HISTORY AND MECHANICS BEHIND FANTASY SPORTS

The foundation for today's fantasy hysteria was laid in 1979 when a close group of friends and diehard baseball fans, led by former New York Times public editor Daniel Okrent, designed and competed with one another in a game they called "Rotisserie Baseball."²⁵ The rules of the game, which remain largely unchanged by Rotisserie's modern fantasy counterparts, were that each of the participating individuals received a budget to draft twenty-three players from either the American or National League, filling roster

have upon the professional leagues); *see also* King, *supra* note 16, at 18 (quoting the general manager of CBSSportsline.com as saying: "The question of whether or not we need the rights is one that hasn't been answered from a legal standpoint But, we would much prefer to work with the leagues because of the bigger picture of the sports world that we operate in . . .").

²⁴ *See* Posting of Kevin D. Caton to IP Law Observer, www.iplawobserver.com (Sept. 13, 2005, 11:04 EST) (providing overview of the legal issues involved in the C.B.C. case and identifying the right of publicity as the determinative claim in the litigation).

²⁵ *See* Ballard, *supra* note 1, at 82. Although Okrent solidified the details of Rotisserie Baseball during an airplane flight from Hartford to Austin in the Fall of 1979, the seed for developing a game that effectively mimicked an entire baseball season had been planted in his mind nearly ten years earlier by a University of Michigan professor who had himself participated in a crude form of fantasy sports. *Id.* at 83. Despite the fact that Okrent has traditionally been hailed as the father of fantasy sports, author Michael Harmon suggests that a crude form of fantasy football may have been launched in the early 1960's by members of the Oakland Raiders organization. HARMON, *supra* note 9, at 16.

spots by position.²⁶ The players were auctioned off to the highest bidder in a much-celebrated draft held prior to the start of the season, and each team's success was determined on the basis of the following eight statistical categories: batting average, home runs, runs batted in, stolen bases, wins, earned run average, saves, and the ratio of walks and hits to innings pitched.²⁷ Given that Okrent, as well as virtually all of the other original Rotisserie players, belonged to the news media, word of Rotisserie spread quickly across the nation.²⁸ Despite the interest sparked by Rotisserie, the laborious effort required to calculate the statistics and league standings by hand and then submit them to the participants via U.S. mail limited the game to only the most diligent of fans.²⁹

Although today's fantasy organizations may have implemented additional rules or innovations,³⁰ the basic structure of fantasy sports has maintained its resemblance to the original Rotisserie league formed by Okrent and his friends in 1979.³¹ Typically, a fantasy sports game provides an individual with the opportunity to be both the general manager and the manager of his or her own sports franchise.³² The fantasy season commences with a mock draft, wherein a participant selects the players for his or her team based upon the notion that the chosen players will have successful seasons.³³ Each participant is competing for cash and prizes against other "owners" who have drafted different players to form their fantasy rosters.³⁴

Standings in the fantasy leagues are compiled by examining the real world performance of professional athletes in a specific set of categories.³⁵ For example, fantasy baseball examines the statistics of players in areas such

²⁶ See Ballard, *supra* note 1, at 83.

²⁷ See *id.*

²⁸ See *id.* In addition to Okrent, who was a consultant for Texas Monthly Magazine in 1979, the original Rotisserie players included a book editor, a writer-illustrator for *The New Yorker*, a screenwriter, and the editor of *Esquire* magazine. *Id.* Although not a member of the media, another notable Rotisserie player was Michael Pollet, an esteemed litigator whose accolades include arguments before the Supreme Court of the United States. See *id.*

²⁹ See generally *id.* at 85.

³⁰ See William Van Winkle, *Build Your Dream Team*, PC MAG., Apr. 22, 2003, at 140. The rules and formats of fantasy sports differ somewhat depending on the particular entity that hosts the game. *Id.* Van Winkle supplies an overview and ratings of six commonly played fantasy sports leagues, including those operated by CBS SportsLine and ESPN Fantasy Games. *Id.* at 140-41.

³¹ See Ballard, *supra* note 1, at 83.

³² See HARMON, *supra* note 9, at 13.

³³ See C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp.2d 1077, 1080 (E.D. Mo. 2006).

³⁴ See *id.*

³⁵ See *id.*

as batting average, home runs, runs batted in, and earned run average.³⁶ In football, these categories may include such statistics as rushing yards, tackles, sacks, and touchdowns.³⁷ The statistics entered into these categories by the fantasy companies are generally obtained via publicly available listings of game statistics and entered into specifically designed computer software. The software performs the calculations necessary to determine who the leading fantasy participants are on any given day.³⁸

Much like a real life general manager and manager, throughout the season fantasy participants execute trades for players with other participants, as well as make changes to their own lineups in anticipation of particular match-ups.³⁹ Success in a fantasy game is predicated upon selecting players who yield the best statistics, which are not necessarily the most notable players.⁴⁰ Generally, a fantasy season lasts the entire length of the actual season that the fantasy sport mimicks, with most fantasy games requiring that the participants pay a small fee to join the league.⁴¹ Depending upon the fantasy service being utilized, some transactions may result in additional costs.⁴²

The fantasy player is kept informed of the latest statistical information via the fantasy organization's website, which presents the statistics in conjunction with the player's name to which they correspond.⁴³ Fantasy

³⁶ See Ballard, *supra* note 1, at 83.

³⁷ See Josh Friedman, *ProTrade Lifts Fantasy Sports to Next Level*, MIAMI HERALD, Jan. 12, 2006, at 5C (comparing the intricate statistics featured in the new ProTrade fantasy football offering to the statistics found in traditional fantasy football games).

³⁸ See Complaint at ¶ 10–11, C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp.2d 1077 (E.D. Mo. 2006) (No. 1-1).

³⁹ See Ballard, *supra* note 1, at 85. The Internet has significantly increased the trading activity among fantasy participants because “[n]ow all a player ha[s] to do [is] wake up and check his team’s stats online, after which he [can] shoot off a couple of ludicrous trade proposals by e-mail.” *Id.* In the words of Eric Barmack, SportingNews.com’s fantasy games manager, to craft a successful fantasy baseball lineup a participant must consider “your ballpark, how your pitching rotation works, how your lineup will hit lefties versus righties, how much money you’re going to spend on defence [sic] versus big bats; you have to deal with injuries, you have to deal with facing teams that have particular strengths or weaknesses.” Wallace, *supra* note 9, at 20.

⁴⁰ Complaint at ¶ 10, C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp.2d 1077 (E.D. Mo. 2006) (No. 1-1).

⁴¹ *Id.* at ¶ 11. However, some of the more competitive leagues require large entry fees and yield fantastic prizes for the winners. See Ballard, *supra* note 1, at 83–84.

⁴² See Complaint at ¶ 11, C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp.2d 1077 (E.D. Mo. 2006) (No. 1-1).

⁴³ See Memorandum in Support of Major League Baseball Players Association’s Motion for Summary Judgment at ¶ 17, C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp.2d 1077 (E.D. Mo. 2006) (No. 45).

sports are a statistics-driven game⁴⁴ and absent the ability to package the statistics together with player names, fantasy games as we know them today could become extinct.⁴⁵

III. THE FEDERAL COPYRIGHT ISSUES SURROUNDING THE OPERATION OF FANTASY SPORTS

One argument that the professional sports leagues have against the fantasy industry is that the commercial use of statistics generated by the athletes constitutes a violation of federal copyright law.⁴⁶ Resolution of this issue would depend entirely upon whether statistics warrant protection under the Copyright Act of 1976. The professional leagues' position is that the fantasy sports organizations have violated the leagues' copyright in the statistics compiled from the performances of their athletes.⁴⁷ Based upon current precedent, there is a plausible, though likely unavailing, argument to be made that copyright law may actually provide some protection for the statistics of professional sports organizations.⁴⁸ Before analyzing the precise question of whether the statistics utilized by fantasy sports are subject to

⁴⁴ See Williams, *supra* note 10, at 1708 ("The lifeblood of the [fantasy baseball] competition is the actual performance statistics of Major League Baseball players.").

⁴⁵ See Derrick Goold, *Local Firm Takes a Swing at MLB over Fantasy Games*, ST. LOUIS POST-DISPATCH, Feb. 11, 2005, at D1 (reporting that the ramifications of affording the leagues a right to the statistics would "eliminate the [fantasy] marketplace," according to CDM Vice-President Charlie Weigart).

⁴⁶ Williams, *supra* note 10, at 1708-09; see also Greg Johnson, *Suing over Statistics*, L.A. TIMES, Jan. 3, 2006, at D1 (quoting Professor Williams as saying: "The question of whether performance statistics are some form of protected intellectual property becomes vital.").

⁴⁷ In its original pleadings in the *C.B.C.* case, baseball raised an affirmative defense alleging that *C.B.C.*'s use of player statistics was a violation of federal copyright law. See Answer, Affirmative Defenses ¶4, *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp.2d 1077 (E.D. Mo. 2006) (No. 7). Although it appears that baseball abandoned the copyright counterclaim in later filings, it remains a plausible theory that could be raised in subsequent fantasy sports litigation and was relevant to the decision in the *C.B.C.* case on the issue of whether the right of publicity was preempted by federal copyright law. See *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp.2d 1077, 1100-03 (E.D. Mo. 2006). The *C.B.C.* Court first reviewed whether the subject matter of player statistics could be subject to the copyright laws, and concluded the information used by fantasy sports was not copyrightable. *Id.* at 37. See Williams, *supra* note 10, at 1718 ("Central to the newer technologies is the use of players' names and their performance statistics Federal copyright law provides limited protection in the compilation of players' performance statistics.").

⁴⁸ Williams, *supra* note 10, at 1718.

copyright protection, it is necessary to begin with a brief history of copyright law, followed by an examination of the intricacies of the legal doctrine.

A. A Brief Historical Overview of Copyright Law

Article I, Section 8, Clause 8 of the United States Constitution first recognized the necessity of establishing a rule of law designed to protect the intellectual property of individuals from unauthorized exploitation by providing Congress with the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁴⁹ Based upon this constitutional grant of power, the First Congress commenced federal copyright protection in 1790.⁵⁰ In 1909, Congress passed the Copyright Act of 1909, which was thoroughly revised by the Copyright Act of 1976.⁵¹

Via federal copyright law, the Anglo-American system of jurisprudence not only protects an individual's property interest in tangible objects, it also recognizes rights in the intangible product of information, more commonly referred to as intellectual property.⁵² The technological revolution has transformed intellectual property law from an area of scant interest to a virtual labyrinth of emerging legal doctrines.⁵³ In recent years, an author attempting to protect his or her copyrighted intellectual property has run into significant obstacles due to the ease by which such property can be transmitted via the Internet.⁵⁴ A portion of the problem is related to the fact that these modern disputes are being governed by outdated copyright laws that have been stretched and contorted to cover situations never contemplated at the time of their passage.⁵⁵

⁴⁹ U.S. CONST. art. I, § 8, cl. 8.

⁵⁰ 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT OV-1 (2005) (citing to Act of May 31, 1790, ch. 15, 1 Stat. 124).

⁵¹ *Id.*

⁵² MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 19 (3d ed. 1999). According to Professor Leaffer, there continues to be intense debate in the legal community regarding the scope of protection that the law should afford to products of the mind. *Id.* at 15.

⁵³ See John Tehranian, *All Rights Reserved? Reassessing Copyright and Patent Enforcement in the Digital Age*, 72 U. CIN. L. REV. 45, 45-46 (2003). In explaining the boom of intellectual property law, Professor Tehranian remarks: "In recent years . . . our nation has embarked on a manic intellectual property land grab . . . [W]e are currently witnessing an intellectual property enclosure movement every bit as significant as the eighteenth century's enclosure of common lands." *Id.*

⁵⁴ See generally *id.* at 46.

⁵⁵ See Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 26 (1996) (exploring the ability of print-based copyright law to transform into a doctrine that effectively deals with the exchange of information in the electronic age).

B. The Originality Requirement and Factual Compilations

To gain copyright protection, the work in question must qualify as an "original work of authorship."⁵⁶ As noted by the Supreme Court in the seminal case of *Feist Publications, Inc. v. Rural Telephone Services Co.*,⁵⁷ the originality requirement is the "*sine qua non* of copyright."⁵⁸ Originality is not only a statutory command; it is a constitutional mandate.⁵⁹ For purposes of copyright law, to be original, a work must be: (1) independently developed; and (2) possess some minimal degree of creativity.⁶⁰ The courts have consistently held that, by definition, mere facts are not subject to copyright protection because no individual can claim originality as to factual information.⁶¹

As clear as the rule may seem regarding the inability to copyright facts, the waters become murky whenever the issue presented to the Court is whether a compilation of factual information can cloak itself with the protection of federal copyright law.⁶² By protecting compilations, the law creates an anomalous dichotomy "afford[ing] to the summation of one hundred or one million [individual facts] a significant measure of protection" while affording none to the facts themselves.⁶³ The goal of a party seeking to prevent another from using factual information for his or her own benefit is

⁵⁶ 17 U.S.C. § 102(a) (2000); see also NIMMER & NIMMER, *supra* note 50, § 2.01, at 2-6.

⁵⁷ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

⁵⁸ *Id.*

⁵⁹ *Id.* at 346.

⁶⁰ *Id.* Further explaining the minimal degree of certainty requirement, the *Feist* Court noted that the standard was low enough to find originality even if only a slight amount of creativity was present. *Id.* at 345.

⁶¹ NIMMER & NIMMER, *supra* note 50, § 2.11[A], at 2-178.7, 2-178.8. The Court in *Feist* offered the following rationale behind the rule against copyrighting facts: "[F]acts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence." *Feist*, 499 U.S. at 347.

⁶² *Feist*, 499 U.S. at 348 (explaining that unlike solitary facts, factual compilations may possess the originality required for copyright protection). From a policy perspective, compilations are afforded protection because unlike mere facts, a compiler typically must make choices on what information to include, where it should be included, and how it should be presented. See *id.* To assist the courts in drawing the tenuous line between a fact and a compilation, the Copyright Act of 1976 provides the following definition of a copyrightable compilation: "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101 (2000).

⁶³ See Robert C. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516, 527 (1981).

to successfully argue that the information in question is actually a compilation, rather than a mere fact.⁶⁴ However, even if an item is deemed to be a protected compilation, the Supreme Court has announced that such protection is "thin."⁶⁵

As explained by the Court in *Feist*, to be deemed a copyrightable compilation, the originality requirement must be satisfied by the selection and arrangement of the data in an original or creative fashion.⁶⁶ Absent the addition of some aspect of originality, a factual compilation cannot be copyrighted despite the amount of hours and labor invested in the gathering of the information.⁶⁷ Applying this standard in *Feist*, the Court ruled that the white pages found in a telephone directory are not entitled to copyright protection despite their potentially high commercial value and the effort expended to discover the information.⁶⁸ The Court explained that the 1,309 names, towns, and telephone numbers copied from the plaintiff's white pages directory were facts, and the "selection, coordination, and arrangement of [the] white pages [did] not satisfy the minimum constitutional standards for copyright protection."⁶⁹ Unlike other copyrightable compilations, in the eyes of the *Feist* Court, the white pages directory was "garden-variety" and

⁶⁴ See NIMMER & NIMMER, *supra* note 50, § 2.11[D], at 2-178.15.

⁶⁵ *Feist*, 499 U.S. at 349. In an effort to demonstrate how "thin" copyright protection is for compilations, the United States Court of Appeals for the Eleventh Circuit formulated the following hierarchy:

There are three types of work that are entitled to copyright protection—creative, derivative, and compiled A creative work is entitled to the most protection, followed by a derivative work, and finally by a compilation. This [hierarchy] is why the *Feist* Court emphasized that the copyright protection in a factual compilation is thin.

Warren Publ'g, Inc. v. Microdos Data Corp., 115 F.3d 1509, 1515 n.16 (11th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 963 (1997).

⁶⁶ *Feist*, 499 U.S. at 349; see also Jason R. Boyarski, Note, *The Heist of Feist: Protection for Collections of Information and the Possible Federalization of "Hot News,"* 21 CARDOZO L. REV. 871, 874-75 (1999).

⁶⁷ See *Feist*, 499 U.S. at 353-60 (rejecting the "sweat of the brow" doctrine applied by many lower courts because such an approach was inconsistent with the statute and "flouted" the basic rules of copyright). In a critique of *Feist*, Professor Williams faulted the Court for failing to recognize both the commercial value of the effort accompanying a compilation and the free-rider effect of allowing individuals to use the information laboriously compiled by another without being required to provide remuneration. See Williams, *supra* note 10, at 1710. In the eyes of Williams, *Feist* may wrongly deny an individual the "fruits of her labor unless the labor is creative, intellectual, or aesthetic." *Id.*

⁶⁸ *Feist*, 499 U.S. at 362-64.

⁶⁹ *Id.* at 362.

“devoid of even the slightest trace of creativity.”⁷⁰ To qualify as a unique “arrangement” within the purview of the copyright laws, factual information must be “order[ed] or group[ed] . . . into lists or categories that go beyond the mere mechanical grouping of data as such, for example, the alphabetical, chronological, or sequential listings of data.”⁷¹

Even in those cases where a factual compilation meets the originality requirement in the arrangement and selection of the data, the protection of copyright law does not extend to every element of the work in question.⁷² Rather, the protection extends only to those components of a work that can be attributed to the originality of the compiler.⁷³ As a result, in the case of a compilation in which originality is founded upon the selection and arrangement of the facts, copyright law only protects the particular selection and arrangement, not the underlying material compiled.⁷⁴ The *Feist* Court illustrated this point by explaining that even if the white pages were subject to protection, copyright law would not have prevented a competing entity from using the directory’s factual information to develop a rival work featuring the same facts, so long as they were selected and arranged in an alternative manner.⁷⁵

⁷⁰ *Id.* Further bolstering its holding that the white pages were not entitled to copyright protection, the *Feist* Court stated that

[the] selection of listings could not be more obvious: It publishes the most basic information—name, town, and telephone number—about each person who applies to it for telephone service This is ‘selection’ of a sort, but it lacks the modicum of creativity necessary to transform mere selection into copyrightable expression.

Id.

⁷¹ See COPYRIGHT OFFICE, GUIDELINES FOR REGISTRATION OF FACT-BASED COMPILATIONS 1 (1989), *quoted in* Key Publ’ns, Inc. v. Chinatown Today Publ’g Enter, 945 F.2d 509, 513 (2d Cir. 1991).

⁷² *Feist*, 499 U.S. at 348.

⁷³ *Id.*; see also LEAFFER, *supra* note 52, at § 2.12[A]. According to Professor Leaffer, “[f]or all varieties of compilations . . . copyright in the compilation extends not to the preexisting materials or data themselves, but to the author’s judgment in selecting and arranging the disparate materials or data and organizing them into a unified work.” *Id.*

⁷⁴ *Feist*, 499 U.S. at 348–49.

⁷⁵ *Id.* at 349, 361. Instinctually, this rule is troubling because it appears to allow one entity to “freeload” off of the hard work and determination of another. This criticism has not been lost on the Supreme Court, which has on numerous occasions highlighted that the Constitution requires such a result because, contrary to popular belief, the goal of copyright law is not to compensate the toils of authors, but “[t]o promote the Progress of Science and useful Arts.” *Id.*, *quoting* U.S. CONST. art. I, § 8, cl. 8. Prior to *Feist*, a number of lower courts reached a different conclusion regarding “freeriders” under the “sweat of the brow” doctrine. See, e.g., *Jeweler’s Circular Publ’g Co. v. Keystone Publ’g*

The highly fact-specific inquiry required to determine whether a factual compilation meets the originality requirement has perplexed the lower courts since *Feist*, resulting in a smattering of seemingly analogous fact patterns being afforded different levels of protection, or no protection at all.⁷⁶ Despite the diversity among the circuits regarding factual compilations, it holds true that “[f]acts *per se*, the economic value of a work or the efforts expended to create a work are insufficient to warrant [copyright] protection.”⁷⁷

1. *The Ability to Copyright Sporting Events and the Resulting Statistics*

A critical question that faces the fantasy sports industry is whether the professional sports leagues can copyright their sporting events and the statistics that are generated therefrom.⁷⁸ Resolution of this issue requires the application of the preceding originality and compilation discussion, as well as a review of critical case law addressing prior attempts by professional sports to assert a right in the statistics and other residual information produced by sporting events.

The most important of these cases, *National Basketball Association v. Motorola, Inc.*,⁷⁹ has provided a shield for many entities and individuals who

Co., 281 F. 83, 89 (2d Cir. 1922). In *Jeweler's Circular*, the defendant was found liable for infringing on the plaintiff's copyright in factual information compiled in a jewelry directory produced by the plaintiff. The Second Circuit reasoned that under copyright law “[n]o one can legally take the results of the labor and expense which another has incurred in the publishing of his work, and thereby save himself ‘the expense and labor of working out and arriving at those results by some independent road.’” *Id.* at 95. This approach to copyright infringement, which later became known as the “sweat of the brow” doctrine, endured for nearly seventy years before being expressly rejected by the *Feist* Court as inconsistent with the constitutional foundation of copyright law. *See Feist*, 499 U.S. at 351–54.

⁷⁶ *See, e.g., Key Publ'ns, Inc.*, 945 F.2d at 513 (affording copyright protection to the compilation of information in a yellow pages telephone directory because it satisfied the creativity in arrangement and selection standard, but finding no infringement of the copyright by another publishing company because its methods of arrangement and selection were sufficiently different from those used in the development of the original directory); *Bellsouth Adver. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc.*, 999 F.2d 1436, 1441 (11th Cir. 1993) (denying copyright protection to yellow pages directory because it failed to meet the *Feist* requirements for originality in a factual compilation).

⁷⁷ Williams, *supra* note 10, at 1712.

⁷⁸ Johnson, *supra* note 46, at D1; *see also* Tresa Baldas, *Does Major League Baseball Own Player Statistics? Some Say It's a Fantasy*, IP LAW & BUS., Apr. 2005, at 10 (reporting on the copyright issues involved in the *C.B.C.* case, including a statement from sports law attorney Kent Goss, a partner in Pillsbury Winthrop's Los Angeles office, that “[h]ow stats are created, how they're kept, and how they're organized might warrant a copyright argument”).

⁷⁹ *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 842 (2d Cir. 1997).

have previously found themselves in the intellectual property crosshairs of the professional sports industry.⁸⁰ In all likelihood, fantasy baseball executives have educated themselves on the intricacies of the *Motorola* decision in the hopes that it will once again ward off any league attempts to claim a protected right in the statistics that are the lifeblood of the fantasy industry.⁸¹ However, in spite of *Motorola*, there exists enough precedential support for the professional leagues to mount a legal attack against the fantasy sports industry based in part upon federal copyright law.⁸²

The controversy in *National Basketball Association v. Motorola* involved Motorola's sale of subscriptions for a pager-type device known as the SportsTrax.⁸³ The SportsTrax contained an inch-and-a-half by inch-and-a-half screen, and the allure of the device for sports fans was that it displayed up-to-date information on the scores and statistics from NBA games in progress.⁸⁴ Every several minutes, Motorola would update the current game information, thus allowing basketball fans to track every game nationwide from the car, the airport, or the doctor's office.⁸⁵ To gain the necessary statistics from all of the ongoing games, Motorola relied upon information submitted by reporters employed by the Sports Team Analysis and Tracking Systems (STATS) company, who monitored the games via television or radio.⁸⁶ The STATS reporters would log the game information into a computer system for statistical compilation and analysis before transmitting the information via satellite to various FM radio networks that would, in turn, convey the information directly to the individual SportsTrax devices.⁸⁷

Once the NBA received word of the SportsTrax device, it filed suit against Motorola in federal court asserting that SportsTrax violated federal copyright law.⁸⁸ The NBA's copyright claim contained the following

⁸⁰ *Id.*; see also Clifford N. MacDonald, Comment, *Gamecasts and NBA v. Motorola: Do They Still Love this Game?*, 5 N.C. J.L. & TECH. 329, 330-32 (2004) (explaining that *Motorola* may provide protection to the Internet gamecasting industry should the leagues issue cease and desist orders requiring that gamecast operators obtain licensure).

⁸¹ See Schwarz, *supra* note 16, at 22 (discussing the effect of *Motorola* on the copyright claims involved in the *C.B.C.* litigation).

⁸² See generally Williams, *supra* note 10, at 1718; *Baltimore Orioles v. Major League Baseball Players Ass'n*, 805 F.2d 663, 669 n.7 (7th Cir. 1986).

⁸³ *Nat'l Basketball Ass'n*, 105 F.3d at 843.

⁸⁴ *Id.* at 843-44.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Nat'l Basketball Ass'n*, 105 F.3d at 845. Aside from the copyright claim discussed in this Note, the NBA also alleged the following: (1) state law misappropriation; (2) false advertising under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1999); (3) false

allegations: (a) SportsTrax violated the NBA's copyright in the underlying game by transmitting the game statistics via the device; and (b) SportsTrax infringed upon the NBA's copyright in the broadcast of basketball games by using information obtained from those broadcasts to operate SportsTrax.⁸⁹

a. The Lack of Copyright Protection in the Underlying Sporting Events

According to the United States Court of Appeals for the Second Circuit, the underlying basketball games whose scores were received by SportsTrax were not entitled to copyright protection under the Copyright Act of 1976.⁹⁰ In rejecting the NBA's contention that Motorola could not transmit the statistics while the games were in progress because the game itself was copyrightable, the court explained that "[s]ports events are not 'authored' in any common sense of the word."⁹¹ The court noted that although a significant amount of preparation and work is expended for a game, this preparation itself does not constitute authorship because the nature of an athletic contest is unpredictable and unscripted by definition.⁹²

In a highly persuasive opinion, the *Motorola* court explained that ruling in favor of the NBA would have had potentially disastrous consequences for professional sports themselves.⁹³ Specifically, affording copyright protection to the underlying game would have allowed the inventor of the Wing-T football formation,⁹⁴ or the two-three zone in basketball to prevent other

representation of origin under § 43(a) of the Lanham Act; (4) state and common law unfair competition by false advertising and false designation of origin; and (5) unlawful interception of communications under the Communications Act of 1934, 47 U.S.C. § 605 (1996). *Id.* at 844.

⁸⁹ *Id.* at 845.

⁹⁰ *Id.* at 846.

⁹¹ *Id.* The Second Circuit reasoned that because sporting events themselves were not acts of authorship, they failed to meet the originality requirement necessary for copyright protection. *See id.*

⁹² *Id.* The court distinguished sporting events from movies and television sitcoms, which are themselves subject to copyright protection, on the grounds that sporting events lack an underlying script and the most perfect of preparation cannot remove an athletic contest entirely from the realm of uncertainty. *Id.*; *see also* NIMMER & NIMMER, *supra* note 50, § 2.09[F], at 2-166.

⁹³ *Nat'l Basketball Ass'n*, 105 F.3d at 846; *see also* MacDonald, *supra* note 80, at 333 (recognizing the practical problems that could have resulted had the court sided with the NBA and afforded copyright protection to the underlying sporting event).

⁹⁴ *Nat'l Basketball Ass'n*, 105 F.3d at 846. It is interesting to observe that from the court's perspective the refusal to permit copyright protection to the underlying game actually benefited the NBA more so than its own argument urging protection. *See id.*

coaches and teams from using such strategies.⁹⁵ In its final paragraph devoted to the issue, the Second Circuit observed that “the lack of caselaw [regarding the ability to copyright the underlying game] is attributable to a general understanding that athletic events were, and are, uncopyrightable.”⁹⁶ By making such a declaration, the court essentially disregarded a portion of the Seventh Circuit’s *Baltimore Orioles, Inc. v. Major League Baseball Players Association*⁹⁷ opinion which noted that “the Players’ performances possess the modest creativity required for copyrightability.”⁹⁸ Despite the Seventh Circuit’s statement in *Baltimore Orioles*, the general rule applied by the courts and recognized by the leading copyright scholars has been that athletic events themselves are not covered by the Copyright Act of 1976.⁹⁹ It has also been argued that this view is shared by the Supreme Court, given dicta in *Zacchini v. Scripps-Howard Broadcasting Co.*,¹⁰⁰ that distinguished between “a copyrighted dramatic work” on one hand and “a baseball game” on the other.¹⁰¹

Although it has been roundly criticized, the *Baltimore Orioles* decision, over which the Supreme Court denied certiorari,¹⁰² has yet to be overruled by the Seventh Circuit and may provide precedential support for the professional leagues against fantasy sports. The issue before the *Baltimore Orioles* court centered around the ownership rights to the broadcasts of Major League Baseball games.¹⁰³ The crux of the controversy was who possessed the ownership rights to the broadcasts of Major League Baseball games: the players or the owners?¹⁰⁴ The Seventh Circuit’s conclusion that

⁹⁵ See generally NIMMER & NIMMER, *supra* note 50, § 2.09[F], at 2–169 (explaining that “if a particular game is a copyrightable work, then future teams may be barred from copying it.”). However, at least one commentator has disagreed with the assertion that team sports cannot be subject to protection. See Brent C. Moberg, Comment, *Football Play Scripts: A Potential Pitfall for Federal Copyright Law?*, 14 MARQ. SPORTS L.J. 525, 540–41 (2004). According to Moberg, there is a strong argument that certain aspects of professional sports, such as a football “play script” prepared by a team’s coach, should be afforded copyright protection. *Id.* at 541–45.

⁹⁶ Nat’l Basketball Ass’n v. Motorola, Inc., 105 F.3d 841, 847 (2d Cir. 1997).

⁹⁷ *Baltimore Orioles v. Major League Baseball Players Ass’n*, 805 F.2d 663, 669 n.7 (7th Cir. 1986), *cert. denied*, 480 U.S. 941 (1987).

⁹⁸ *Id.* Despite its conclusion that a baseball game is a copyrightable work, the *Baltimore Orioles* decision has been roundly criticized by other courts as well as legal scholars for failing to properly analyze the issue. See, e.g., NIMMER & NIMMER, *supra* note 50, § 2.09[F], at 2–167, 2–168 (criticizing the logic of *Baltimore Orioles*’ holding).

⁹⁹ See NIMMER & NIMMER, *supra* note 50, § 2.09[F], at 2–166.

¹⁰⁰ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575 (1977).

¹⁰¹ *Id.*; see also NIMMER & NIMMER, *supra* note 50, § 2.09[F], at 2–167, n.70.

¹⁰² 480 U.S. 941 (1987) (denying petition for certiorari).

¹⁰³ See *Baltimore Orioles*, 805 F.2d at 665–66.

¹⁰⁴ See *id.*

the act of telecasting baseball games is subject to copyright protection accords with the general consensus among courts and commentators.¹⁰⁵ However, the assertion in a footnote by the *Baltimore Orioles* court that “[t]he Players’ performances possess great commercial value . . . [and thus] embody the modicum of creativity required for copyrightability,”¹⁰⁶ has drawn the ire of many a judge and legal scholar.¹⁰⁷

b. Copyright Protection Afforded to the Broadcasting of Sporting Events and the Control of Real-Time Dissemination of Sports Statistics

The *Motorola* court held that the act of broadcasting a game, unlike the underlying sporting event, is copyrightable under the Copyright Act of 1976, as amended by 17 U.S.C. § 102(a).¹⁰⁸ According to a House Report regarding the amendment found in § 102(a):

[w]hen a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of

¹⁰⁵ See *id.* at 668–69; see also NIMMER & NIMMER, *supra* note 50, § 2.09[F], at 2–166.

¹⁰⁶ *Baltimore Orioles*, 805 F.2d at 669 n.7. In support of its statement, the Seventh Circuit related the following quote from Justice Oliver Wendell Holmes: “[i]f [certain works] command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt.” *Id.*, quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 252 (1903) (finding a circus poster subject to copyright protection). The *Baltimore Orioles* court further explained that the great commercial value associated with player performances “indicates that the works embody the modicum of creativity required for copyrightability.” *Id.* In the alternative, the court stated that even if the players’ performances were not subject to copyright protection, the telecasts themselves are due to the labor and creativity of the broadcasting entity and its employees. *Id.*

¹⁰⁷ See, e.g., *Nat’l Basketball Ass’n v. Motorola*, 105 F.3d 841, at 846–47 (2d Cir. 1997) (noting criticism of *Baltimore Orioles*); see also NIMMER & NIMMER, *supra* note 50, § 2.09[F], at 2–166, 2–167 (rebuking the *Baltimore Orioles* decision, including citations to numerous lower court opinions refusing to adopt the Seventh Circuit’s reasoning); Gary R. Roberts, *The Scope of the Exclusive Right to Control Dissemination of Real-Time Sports Event Information*, 15 STAN. L. & POL’Y REV. 167, 168–69 (explaining that “the sports contests themselves are not works of authorship that can be copyright protected under the federal Copyright Act of 1976”); Shelley Ross Saxer, Note, *Baltimore Orioles, Inc. v. Major League Baseball Players Association: The Right of Publicity in Game Performances and Federal Copyright Preemption*, 36 UCLA L. REV. 861, 870 (1989) (concluding that “[t]he baseball game itself . . . is simply not a copyrightable event”).

¹⁰⁸ See *Motorola*, 105 F.3d at 847. Section 102(a) of the Copyright Act grants copyright protection to any original work “fixed in any tangible medium of expression.” 17 U.S.C. § 102(a) (2000).

their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and the director are doing constitutes authorship.¹⁰⁹

As evidenced by the House Report, the basis for the distinction between the copyrighting of a broadcast and that of the underlying athletic event is the creativity and ingenuity of those involved in the process of turning an event into an attractive product for viewers throughout the nation.

The issue in *Motorola* was not merely whether broadcasts of sporting events can be copyrighted; rather, the most significant question before the court was whether the STATS reporters, who gained the statistics by watching or listening to the reproduction of the games, infringed on the NBA's copyright in the broadcast.¹¹⁰ Relying upon the categorical exclusion of facts from copyright protection, the court held that SportsTrax was providing purely factual information that "any patron . . . could acquire from the arena" without the assistance of any directors or producers whose work adds the requisite originality for copyright protection.¹¹¹ According to the court, the NBA's copyright in the broadcasting of its games afforded protection over only the artistic pieces of the broadcast and not over the statistical information that was itself learned from the transmission.¹¹²

Likewise, in *Morris Communications Corp. v. PGA Tour, Inc.*,¹¹³ an important post-*Motorola* decision, the Eleventh Circuit examined the legality of the unauthorized dissemination of statistical information arising from professional golf tournaments. Although technically decided under the Sherman Act and antitrust law rather than copyright,¹¹⁴ the *PGA Tour* court's analysis may prove instructive in determining whether the fantasy sports industry's use of statistical information violates copyright law.

At issue in *PGA Tour* was the Tour's use of the Real-Time Scoring System (RTSS) to monitor the status of play throughout the entire golf course in order to maintain a running tabulation of each golfer's score.¹¹⁵ The RTSS, which was developed by the Tour, was a complex computer program and electronic relay system that allowed the Tour to routinely update player

¹⁰⁹ H.R. No. 94-1476 at 52, *reprinted in* 1976 U.S.C.C.A.N. 5665.

¹¹⁰ *See Motorola*, 105 F.3d at 850-52.

¹¹¹ *Id.*; *see also* MacDonald, *supra* note 80, at 334 (noting that the court's refusal to find a violation of the copyright broadcast was because the SportsTrax device only reproduced factual information gained from the broadcasts, rather than the expression of the broadcasts themselves).

¹¹² *Motorola*, 105 F.3d at 847.

¹¹³ *Morris Commc'n Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1288 (11th Cir. 2004).

¹¹⁴ *Id.* at 1293 n.6.

¹¹⁵ *Id.* at 1290.

scores on its website throughout the entire tournament.¹¹⁶ RTSS operated by engaging a number of volunteer scorers to follow each group of players on the course to compile their individual scores.¹¹⁷ This scoring information was then relayed to a mobile production vehicle where statistics and rankings were tabulated before being electronically transmitted to both the website and an on-site media center.¹¹⁸ Due to the vast expanse of land covered during a PGA Tour event, and the fact that electronic devices were banned on the courses, the only source of compiled scores was the Tour's website and media center.¹¹⁹ Further solidifying the Tour's control over the real-time scores from its events, the Tour required that all media entities covering a tournament sign a contract agreeing to delay reporting any scores from the event until the earliest of: (1) thirty minutes following the occurrence of a shot; or (2) the time when the scoring information appeared on the Tour's website.¹²⁰

Morris Communications, the plaintiff and the Tour's only major competitor in the market of reporting golf scores, began publishing real-time scores from Tour events.¹²¹ However, Morris's competitive ability was stifled by the Tour's RTSS program and its refusal to allow the media reporting of statistics until after the information was made public via www.pgatour.com.¹²² Morris sought injunctive relief against the Tour, alleging that its practices violated both federal antitrust law and state unfair trade practices law.¹²³ The *PGA Tour* court ruled that the Tour had a property interest in its product and could enter into contractual arrangements to protect that interest.¹²⁴ Thus, despite the existence of *Motorola*, the Tour was permitted to protect the release of the statistical information related to its

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1290–91.

¹¹⁸ *Id.*

¹¹⁹ *PGA Tour*, 364 F.3d at 1291.

¹²⁰ *Id.*

¹²¹ *Id.* at 1288.

¹²² *Id.* at 1291–92.

¹²³ *Id.* at 1292. Ultimately, summary judgment was granted in favor of the Tour with the court expressly disavowing any effect that its opinion may have upon federal copyright law. *Id.* at 1293 n.6, 1298. The Eleventh Circuit believed that any copyright claims were moot because the statistical information was a historical fact free from copyright registration the minute it was released onto the Tour's website. *Id.* at 1293 n.6

¹²⁴ *Id.* at 1298 n.15. As clear as it is that the property right at issue does not come from copyright law, it is just as ambiguous where the Tour's property right emanates from. *See id.* In failing to identify the source of the property right and steering away from copyright law, the court "skirted the complex intellectual property issues underlying its holding." Andrea Freeman, Note, *Morris Communications v. PGA Tour: Battle over the Rights to Real-Time Sports Scores*, 20 BERKELEY TECH. L.J. 3, 17 (2005).

tournaments. Based upon the originality requirement of copyright, if the Eleventh Circuit had chosen to provide an analysis of the copyright issues involved in *PGA Tour*, it arguably would have concluded that the compiled scores did not possess the originality in selection and arrangement required by *Feist* for protection.¹²⁵

Despite *Motorola* and the inferences drawn from *PGA Tour*, a compilation of sports statistics is not perpetually doomed from gaining copyright protection. In *Kregos v. Associated Press*,¹²⁶ the Second Circuit afforded copyright protection to a compilation of baseball statistics.¹²⁷ The plaintiff in *Kregos* developed a pitching form, which displayed statistical data concerning the past performances of the pitchers scheduled to start in each day's baseball game.¹²⁸ Although a number of these pitching forms were in existence in 1983 when *Kregos* developed the particular form at issue in the litigation, each utilized different statistics and arranged them in a different manner.¹²⁹ The pitching form in question contained nine columns, arranged into the following three categories: (1) each pitcher's statistics for the current season, including wins, losses, and earned run average (ERA); (2) each pitcher's performance during his career against the scheduled opponent, in the particular stadium where the upcoming game was scheduled; and (3) various statistics from each pitcher's last three starts, including innings pitched, wins, losses, ERA, and the men-on-base average.¹³⁰

In 1984, the Associated Press published its own pitching form that essentially mirrored that previously produced by *Kregos*.¹³¹ *Kregos*

¹²⁵ See *PGA Tour*, 364 F.3d at 1297–98. Although the arrangement or selection of the statistics used by the Tour's RTSS program may have been protected by copyright law, the statistics themselves, as facts, could have been freely copied without a copyright violation, so long as the copying entity employed a different manner of arrangement and selection. See *id.*; see also *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348–49 (1991).

¹²⁶ *Kregos v. Assoc. Press*, 937 F.2d 700 (2d Cir. 1991).

¹²⁷ *Id.* at 705.

¹²⁸ *Id.* These pitching forms would be distributed by *Kregos* to subscribing newspapers who would then print the information in their sports sections. *Id.* at 705. Inevitably, the statistics in these forms were pervasively used by gamblers and bookmakers, as well as avid baseball fans. See *Kregos v. Assoc. Press*, 731 F. Supp. 113, 114 (S.D.N.Y. 1990), *rev'd*, 937 F.2d 700, 711 (2d Cir. 1991).

¹²⁹ *Kregos*, 731 F. Supp. at 114.

¹³⁰ *Id.* At the time that he created the forms, no other form included a category for a pitcher's men on base average. *Id.* at 115. The men on base average represents the average number of players to reach base by hits and walks per nine innings. *Id.* The earned run average represents the average number of earned runs—those runs scored on account of the pitcher and not the errors committed by his teammates—per nine innings. *Id.*

¹³¹ *Id.*

responded by filing suit, alleging copyright and trademark infringement.¹³² The district court granted summary judgment in favor of the Associated Press on both claims.¹³³ On appeal, the Second Circuit reversed on the copyright claim because “[i]t cannot be said as a matter of law that in selecting the nine items for his pitching form out of the universe of available data, Kregos has failed to display enough selectivity to satisfy the requirement of originality.”¹³⁴ Furthermore, the appellate court explained that because there existed a multitude of different statistical categories by which a pitcher’s performance could be measured, Kregos’s selection of the nine particular categories warranted copyright protection.¹³⁵ As dictated by *Feist*, the *Kregos* court held that the copyright protection in the statistics was limited and would not be violated by the creation of another form that presents several different categories arranged in an alternative manner.¹³⁶

C. A Proposal for Resolving the Copyright Issues Involved in Fantasy Sports

Based upon the current state of copyright law, the professional sports leagues should not prevail on any copyright infringement claims that they have lodged, and will potentially continue to lodge, against the fantasy sports industry. According to *Feist* and its progeny, facts in and of themselves do not possess the level of originality necessary for copyright protection.¹³⁷ The statistics used by the various fantasy sports games are facts that are easily accessible to the public via the Internet, television, newspaper, and other forms of media. The very same statistical categories used in the operation of fantasy games are printed daily in box scores found in newspapers from

¹³² *Id.* at 116.

¹³³ *Kregos*, 731 F. Supp. at 122. The district court held that the plaintiff’s pitching forms did not contain the necessary originality in arrangement and selection necessary to qualify for copyright protection as a factual compilation. *Id.* at 118.

¹³⁴ *Kregos*, 937 F.2d at 704. A number of other courts have addressed analogous situations involving the copyright protection to be afforded to statistical reports and templates, with well-reasoned decisions existing on both sides of the issue. *See, e.g.*, *Victor Lalli Enter., Inc. v. Big Red Apple, Inc.*, 936 F.2d 671, 673 (2d Cir. 1991) (decision handed down two days after *Kregos*, finding that a horse racing chart used to present race statistics failed to meet the requirements for copyright protection); *Triangle Publ’ns, Inc. v. Sports Eye, Inc.*, 415 F. Supp. 682, 686 (E.D. Pa. 1976) (finding no copyright infringement because the defendant’s horseracing forms differed from the statistical data compiled in the plaintiff’s horseracing publications).

¹³⁵ *Kregos*, 937 F.2d at 711.

¹³⁶ *Id.* at 710. If the Associated Press’s pitching form differed from *Kregos*’s “in more than a trivial degree” then no copyright violation would have occurred. *Id.*

¹³⁷ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348–49 (1991).

coast-to-coast and presented in real-time format twenty-four hours per day courtesy of ESPN and other media entities.

The *Motorola* opinion is analogous to the fantasy baseball controversy.¹³⁸ As in *Motorola*, in order for professional sports to prevail against the fantasy industry under a copyright theory, the courts would need to afford copyright protection to the underlying game itself. Despite the puzzling footnote in *Baltimore Orioles*, it is well-established that an athletic event lacks the originality necessary under copyright law.¹³⁹

Aside from precedent, the strong policy reasons behind the exclusion of athletic events from copyright protection signal that no change in jurisprudential philosophy is likely.¹⁴⁰ Although Professor Williams states that "copyright law provides limited protection in the compilation of players' performance statistics,"¹⁴¹ the statistics used by fantasy sports do not constitute a copyrightable compilation belonging to the professional leagues.

Unlike the compilation cases where copyright protection has been granted, the leagues have not produced directories of statistics that are in turn being used to configure the fantasy offerings. The statistics are obtained from watching the games and reading publicly available box scores, not by copying any directory or encyclopedia-like compilation of statistics produced by the leagues. Even assuming arguendo that this were the case, and such directories were sufficiently creative in their arrangement and selection to qualify for protection, after *Feist* the statistics themselves would not be protected; only the particular method of arrangement and selection would be shielded by copyright law.¹⁴² Thus, because the statistics such as batting average and innings pitched would not themselves be protected, the fantasy sports industry could escape liability by creatively rearranging the presentation of such statistics. For example, rather than organizing the statistics in the typical box score fashion, a fantasy company could creatively

¹³⁸ Some have argued that *Motorola* is in need of reconsideration due to the tremendous commercial value in statistics and real-time game information. See, e.g., Waldmeir, *supra* note 15, at 14 (questioning whether *Motorola* still applies in a technology-driven world where there is more money to be made from statistics than from the underlying games themselves).

¹³⁹ See NIMMER & NIMMER, *supra* note 50, at 2.09[F] (reviewing a number of cases holding that athletic events cannot be afforded copyright protection); Nat'l Basketball Ass'n v. Motorola, 105 F.3d 841, at 846 (2d Cir. 1997) ("[s]ports events are not 'authored' in any common sense of the word").

¹⁴⁰ See NIMMER & NIMMER, *supra* note 50, at 2.09[F] (outlining the policy reasons behind the denial of copyright protection to athletic events).

¹⁴¹ Williams, *supra* note 10, at 1718.

¹⁴² See *Feist*, 499 U.S. at 348. Accordingly, so long as the fantasy sports games were arranging and selecting the statistics in a different manner there would be no valid copyright infringement claim.

arrange the statistics in terms of offensive and defensive statistics or include several new and distinctive statistical categories in the fantasy game.¹⁴³

Although the leagues may try to rely upon *Kregos* and argue that the statistical categories utilized by fantasy sports—wins, losses, batting average, ERA, tackles, sacks, three-pointers, etc.—are entitled to copyright protection, such an argument misreads *Kregos* and is fundamentally flawed. Unlike *Kregos* where the statistical categories used in the form were duplicated by the Associated Press, in the fantasy controversy the professional leagues did not first formulate the categories utilized by the fantasy industry.¹⁴⁴ In fact, many of the statistical categories currently found in fantasy games and the manner in which they are utilized were created by the founders of fantasy sports themselves.¹⁴⁵ The fantasy sports industry has been using the statistics in question for over thirty years without any complaints from the leagues; therefore, it would be illogical to afford the leagues a copyright interest in those statistics so that the league could exploit the success and ingenuity of the fantasy sports industry by using the statistics to create their own fantasy games.

A thought-provoking question is whether the fantasy sports industry itself could raise copyright infringement claims against those professional leagues that are now interjecting themselves into the fantasy market. Based upon one reading of existing precedent, such a theory seems plausible. The fantasy industry has created statistical categories and a method for using generally available statistics to create a game that mimics particular professional sports. As in *Kregos*, the statistical categories used by the fantasy industry have been selected and arranged in a creative manner. The professional leagues, like the Associated Press in *Kregos*, are attempting to duplicate the categories and essentially fantasy itself by creating their own fantasy offerings.¹⁴⁶ Undoubtedly, the mechanics of fantasy sports and their unique usage of statistical categories and compilations were not developed by the professional leagues. Despite this fact, should the law now permit the professional leagues to piggyback upon the success of fantasy sports by

¹⁴³ See Friedman, *supra* note 37, at 5C (discussing an emerging fantasy game setup based in part upon the addition of unique statistical categories).

¹⁴⁴ See *id.*

¹⁴⁵ See Ballard, *supra* note 1, at 83. Rotisserie founder Daniel Okrent was the first to widely use the ratio of walks and hits to innings pitched (WHIP) statistic, which is extensively used today because of fantasy sports. *Id.*; see also Friedman, *supra* note 37, at 5C (discussing a new fantasy offering known as ProTrade, which is based upon the use of new statistical categories such as the number of “assists that lead to slam-dunks” and the average field position obtained by a kicker).

¹⁴⁶ See National Football League Fantasy Sports, <http://www.nfl.com/fantasy>; National Basketball Association Fantasy Sports, <http://www.nba.com/fantasy>; National Hockey League Fantasy Sports, <http://www.nhl.com/fantasy>; Major League Baseball Fantasy Sports, <http://mlb.mlb.com/NASApp/mlb/mlb/fantasy/index.jsp>.

duplicating their methods and techniques? Though the normative answer to this question is in the negative, as a descriptive matter current copyright law appears to permit such a result. Unless a fantasy company can identify that a professional league's fantasy offerings are utilizing a specific and unique statistical compilation developed by the fantasy company, copyright law provides no redress for the fantasy industry.¹⁴⁷

IV. THE INTERSECTION OF THE RIGHT OF PUBLICITY AND FANTASY SPORTS

Another claim raised by the professional sports leagues against the fantasy industry is that by using the names of professional athletes together with their performance statistics, fantasy sports have violated the athletes' rights of publicity.¹⁴⁸ This Section discusses the right of publicity, including the development of the right and an analysis of the viability of such a claim in the context of fantasy sports. Also included in the analysis will be an exploration of the possible First Amendment defense that may be available to the fantasy industry and a proposal on how the courts should apply the right of publicity to fantasy sports.

A. *A Historical Overview of the Right of Publicity*

According to the most authoritative treatise in the area, "the right of publicity . . . is the inherent right of every human being to control the commercial use of his or her identity."¹⁴⁹ The right of publicity is a unique

¹⁴⁷ For example, under *Kregos* a fantasy company could likely maintain a copyright claim if it could demonstrate both that: (1) it had uniquely categorized and compiled a certain group of performance statistics in order to create a new category for its fantasy game; and (2) a professional league such as the MLB copied that statistical compilation for use in its own fantasy operations. *Cf. Kregos v. Assoc. Press*, 937 F.2d 700, 700 (2d Cir. 1991).

¹⁴⁸ See Memorandum in Support of Major League Baseball Players Association's Motion for Summary Judgment at ¶ 1, *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp.2d 1077 (E.D. Mo. 2006) (No. 45).

¹⁴⁹ J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3, at 3 (2d ed. 2004). Though the overwhelming majority of cases and scholarship focus upon the right of publicity as it relates to celebrities, it is a right that exists in everyone regardless of fame or fortune. *Id.* According to another commentator, "the right of publicity is, basically, the right to own, protect, and profit from the commercial value of one's name, likeness, activities, or identity, and to prevent the unauthorized exploitation of these traits by others." Kenneth E. Spahn, *The Right of Publicity: A Matter of Privacy, Property, or Public Domain?*, 19 NOVA L. REV. 1013, 1014 (1995).

creature of state intellectual property law,¹⁵⁰ with a “family resemblance[.]” to the right to privacy, trademark, copyright, false advertising, and unfair competition.¹⁵¹ Although now an oft-litigated and well-established independent legal doctrine, the right of publicity as we know it today is the product of decades of legal debate, extensive scholarship, an innovative judge, and an undeniable level of fortuity.¹⁵² To fully understand and appreciate the nuances of the right of publicity, it is first necessary to explore its historical background and the manner in which it catapulted from a subset of privacy law to a veritable safe-haven for entertainers seeking to control the dissemination of their personas.

1. *The Right to Privacy Roots*

By all accounts, the modern day right of publicity is a spin-off from the common law right to privacy¹⁵³ as was first expressed by Samuel D. Warren and future Supreme Court Justice Louis D. Brandeis in an 1890 Harvard Law Review article entitled, *The Right to Privacy*.¹⁵⁴ Warren and Brandeis believed that the law needed to insulate an individual’s private life from the prying eyes of others because “[s]ome things all men alike are entitled to keep from popular curiosity, whether in public life or not”¹⁵⁵ The thesis of Warren and Brandeis’s article was eventually adopted by courts throughout the country to protect an individual whose private life had been publicly used without permission.¹⁵⁶

¹⁵⁰ See John Grady, Steve McKelvey, & Annie Clement, *A New ‘Twist’ for ‘The Home Run Guys’?: An Analysis of the Right of Publicity Versus Parody*, 15 J. LEGAL ASPECTS SPORT 267, 271 (2005). Currently, twenty-eight states recognize the right of publicity either as a common law right, by a statutory provision, or both. *Id.*

¹⁵¹ MCCARTHY, *supra* note 149, at 3.

¹⁵² See generally Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 853–54 (1995). Professor Halpern aptly describes the evolution of the right of publicity as “more fortuitous than inevitable, more paradoxical than logical.” *Id.* at 855.

¹⁵³ See MCCARTHY, *supra* note 149, at 4.

¹⁵⁴ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 206 (1890). The article by Warren and Brandeis has been hailed by the most respected of scholars as “perhaps the most famous and certainly most influential law review article ever written.” Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 203 (1954). According to Professor Nimmer, Roscoe Pound once referred to Warren and Brandeis’s work as doing “nothing less than add[ing] a chapter to our law.” *Id.*

¹⁵⁵ Warren & Brandeis, *supra* note 154, at 215–16.

¹⁵⁶ See Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1203–04 (1986).

However, during the development of the right to privacy jurisprudence, American culture had not yet entered the era of celebrity fascination and exploitation.¹⁵⁷ In stark contrast to modern society, during the early and mid twentieth century the use of a celebrity's name for product endorsement was viewed as demeaning to the individual.¹⁵⁸ As the entertainment industry grew and its participants became more noteworthy, the limitations of the traditional right to privacy became apparent because "[w]ell known personalities . . . do not seek the 'solitude and privacy' which Brandeis and Warren sought to protect Their concern is rather with publicity, which may be regarded as the reverse side of the coin of privacy."¹⁵⁹ Due to the increasing popularity of the entertainment industry and the public personality, an individual's celebrity status became an item of pecuniary value in need of legal protection.¹⁶⁰

The original right to privacy was inadequate to protect the use of a celebrity's name, likeness, or photograph because courts viewed celebrities as public figures who had waived their right to privacy.¹⁶¹ Most courts took the approach advocated by the United States Court of Appeals for the Fifth Circuit in *O'Brien v. Pabst Sales Co.*¹⁶² In *O'Brien*, the court rejected former professional football player David O'Brien's claim that the use of his photograph in a Pabst Blue Ribbon beer advertisement violated his right to privacy.¹⁶³ According to the Fifth Circuit, O'Brien could not claim a right to privacy violation because as a celebrity "the publicity he got was only that which he had been constantly seeking and receiving."¹⁶⁴ Foreshadowing the eventual rise of the right of publicity, Judge Holmes dissented from *O'Brien* based upon his belief that an individual possessed a separate property right in the use of his name and likeness.¹⁶⁵ The rigidity of the right to privacy and its inability to compensate individuals whose identities were already part of the public domain created a legal climate ripe for doctrinal change.¹⁶⁶ The law

¹⁵⁷ See *id.* at 1205.

¹⁵⁸ See *id.*

¹⁵⁹ Nimmer, *supra* note 154, at 203–04.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* The California courts adopted the waiver approach believing that: "[The right to privacy] does not exist where a person has become so prominent that by his very prominence he has dedicated his life to the public and thereby waived his right to privacy. There can be no privacy in that which is already public." *Melvin v. Reid*, 297 P. 91, 93 (1931).

¹⁶² *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941).

¹⁶³ *Id.* at 168.

¹⁶⁴ *Id.* at 170.

¹⁶⁵ See *id.* at 170, 171 (Holmes, J., dissenting).

¹⁶⁶ See MCCARTHY, *supra* note 149, at 48.

needed a mechanism for protecting individuals from the uncompensated use of their personas in commerce.¹⁶⁷ Enter the right of publicity.

2. Recognizing the Right of Publicity

The right of publicity was first explicitly recognized by Judge Jerome Frank of the Second Circuit in the case of *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*¹⁶⁸ In *Haelan*, the plaintiff had entered into a contract with a professional baseball player for the exclusive right to use his photograph on trading cards distributed in conjunction with the sale of its packets of chewing gum.¹⁶⁹ Topps Inc., a rival chewing gum company, was aware of the Haelan agreement yet proceeded to convince the same player to authorize the use of his photograph in connection with the sale of its gum.¹⁷⁰ Believing that Topps's conduct constituted inducement to breach a contract, Haelan commenced suit in the United States District Court of the Eastern District of New York.¹⁷¹ In its defense, Topps argued that the contract between Haelan and the player was nothing more than a release of liability because under privacy law a celebrity lacked the ability to assign his privacy interest in his photograph to another.¹⁷²

In a truly groundbreaking opinion, Judge Frank held that the baseball player could grant an exclusive and enforceable right in his image to a third party such as Haelan.¹⁷³ To reach this conclusion, Judge Frank revolutionized

¹⁶⁷ See Laura Lee Stapleton & Matt McMurphy, *The Professional Athlete's Right of Publicity*, 10 MARQ. SPORTS L.J. 23, 28 (1999); see also MCCARTHY, *supra* note 149, at 9 (explaining that "[m]esmerized by the 'privacy' label, judges could not see how [famous] plaintiffs had a claim for invasion of 'privacy' The situation was ripe for some courageous judge to break out of the 'privacy' mold of thinking").

¹⁶⁸ *Haelan Lab., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

¹⁶⁹ *Id.* at 867.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* The district court, sitting in diversity, decided *Haelan* under New York state law. MCCARTHY, *supra* note 149, at 51–52.

¹⁷² *Haelan*, 202 F.2d at 868. The inability to assign one's interest was one of the major restrictions on the right to privacy. See JULIUS C. S. PINCKAERS, FROM PRIVACY TOWARD A NEW INTELLECTUAL PROPERTY RIGHT IN PERSONA § 2.2[B], 24 (1996). The non-assignability of the right to privacy "greatly diminished the possibility for persons to exploit the commercial value of their identity, because advertisers could not get exclusive rights enforceable against third parties." *Id.* Prior to *Haelan*—and for quite some time after it in many jurisdictions—the courts viewed contractual permission to use a celebrity's likeness for commercial purposes as merely being a waiver of the individual's personal right to privacy. *Id.*

¹⁷³ *Haelan*, 202 F.2d at 868.

intellectual property law by coining the phrase “right of publicity” and ruling:

[A] man has a right in the publicity value of his photograph, *i.e.*, the right to grant the exclusive privilege of publishing his picture

This right might be called a “right of publicity.” For it is common knowledge that many prominent persons . . . would feel sorely deprived if they no longer received money for authorizing advertisements¹⁷⁴

By turning away from the bondage of the right to privacy, *Haelan* clearly rejected privacy’s non-assignability structure in favor of a legal rule much more protective of a public figure’s ability to capitalize on the commercial usage of his or her persona.¹⁷⁵

Following Judge Frank’s pronouncement in *Haelan*, the right of publicity was given an additional boost by intellectual property scholar Professor Melvin Nimmer’s 1954 article, *The Right of Publicity*.¹⁷⁶ In an effort to illustrate the importance of Nimmer’s scholarship in relation to the establishment of the right of publicity, Professor McCarthy offered the following description: “If Judge Frank was the architect of a ‘right of publicity,’ then Professor Nimmer was the first builder.”¹⁷⁷ In his article, Nimmer skillfully highlighted the deficiencies in the existing legal theories—privacy,¹⁷⁸ unfair competition,¹⁷⁹ contracts,¹⁸⁰ and defamation¹⁸¹—and explained how the right of publicity could be developed to adequately address the gaps left by the aforementioned legal theories.¹⁸² Perhaps the largest contribution made by Nimmer was his conclusion that the right of publicity should not be limited to celebrities, thereby providing an answer to

¹⁷⁴ *Id.*

¹⁷⁵ See Joseph R. Grodin, Note, *The Right of Publicity: A Doctrinal Innovation*, 62 YALE L.J. 1123, 1125–26 (1953) (explaining that opposite the right to privacy, an individual’s right of publicity claim will be strengthened by prior publicity and notoriety).

¹⁷⁶ Nimmer, *supra* note 154, at 204.

¹⁷⁷ MCCARTHY, *supra* note 149, at 54.

¹⁷⁸ See Nimmer, *supra* note 154, at 204–10.

¹⁷⁹ See *id.* at 210–14. Implicitly included within the umbrella of unfair competition law were the doctrines of trademark and service mark law. See generally *id.* at 212; see also MCCARTHY, *supra* note 149, at 55.

¹⁸⁰ See Nimmer, *supra* note 154, at 214–15.

¹⁸¹ See *id.* at 215.

¹⁸² See *id.* at 223 (“[W]hether the right of publicity is finally and fully realized by statute or through growth and adaptation of common law principles, eventual recognition of the right seems assured both from the trend of decisions already rendered, and from the more fundamental fact of community needs.”).

an important question left unresolved by *Haelan*.¹⁸³ After the publication of Nimmer's article, "[i]t remained for the courts and other commentators to test and apply [his] seminal analysis and theories."¹⁸⁴ The courts, academicians, and legislators alike have since spent decades attempting to arrive at a consensus regarding the formulation of, and the limits upon, the quagmire that has become the right of publicity.¹⁸⁵

The 1970's could be described as the heyday of the right of publicity because that decade saw a tremendous spike in right of publicity litigation, resulting in the right being recognized in an increasing number of states.¹⁸⁶ The pinnacle of the 1970's right of publicity jurisprudence was reached in 1977 when the Supreme Court explicitly recognized its independent existence in *Zacchini v. Scripps-Howard Broadcasting Co.*¹⁸⁷ In *Zacchini*, the plaintiff was an entertainer at a local county fair whose fifteen second cannonball act was videotaped by a newscaster and later replayed in its entirety on the station's nightly news program.¹⁸⁸ *Zacchini* sued the station claiming a violation of his right of publicity for the reproduction of his live act without his consent.¹⁸⁹ The station defended its actions under the First Amendment, claiming that the freedom of the press granted the station immunity from a right of publicity claim.¹⁹⁰ In rejecting the station's defense, the Court held that the First Amendment did not permit the station to air *Zacchini*'s entire performance without providing him with some form of

¹⁸³ See *id.* at 217. Professor Nimmer concluded that "every person has the property right of publicity" despite the fact that it will most often be employed by famous individuals. *Id.*

¹⁸⁴ See MCCARTHY, *supra* note 149, at 56.

¹⁸⁵ See Sarah M. Konsky, *Publicity Dilution: A Proposal for Protecting Publicity Rights*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 347, 352 (2005). In an effort to avoid recognizing the right of publicity as an independent legal doctrine, as was propounded by *Haelan* and Nimmer, Dean William L. Prosser proposed that the right be denominated "invasion of privacy by appropriation" and included as one of four torts encompassed by the right to privacy. See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 383 (1960). According to Prosser, the appropriation category protected both a commercial and a personal dignity interest regardless of the label attached. *Id.* at 401-03. Prosser's approach has now been rejected by most courts and scholars, as his failure to distinguish between the two very different individual interests in personal dignity and commercial appropriation led to uncertainty in the law. See MCCARTHY, *supra* note 149, at 40.

¹⁸⁶ See MCCARTHY, *supra* note 149, at 58 (offering an overview of the development of the right of publicity during the 1970s).

¹⁸⁷ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 574-75 (1977).

¹⁸⁸ *Id.* at 563-64.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 565.

remuneration.¹⁹¹ The Court “lauded the state-law right of publicity as creating an ‘economic incentive’ for performers to make the ‘investment required’ to produce a performance of interest to the public”¹⁹² Perhaps most significant was the Court’s affirmation of Nimmer and *Haelan*’s belief that the right of publicity was an independent action apart from the right to privacy.¹⁹³

The next considerable landmark in the right of publicity jurisprudence occurred in 1995 when the American Law Institute’s Restatement of the Law of Unfair Competition devoted several sections to the right of publicity.¹⁹⁴ Section 46 of the Restatement provides that “[o]ne who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability”¹⁹⁵ By using the phrase “for purposes of trade,” the Restatement’s right of publicity captures the use of persona in advertising, on merchandise or in connection with services, while excluding the use of identity in news reporting, commentary, entertainment or works of fiction and non-fiction.¹⁹⁶ To date, the right of publicity continues to be the topic of

¹⁹¹ *Id.* at 575, remarking:

[T]he First and Fourteenth Amendments do not immunize the media [from right of publicity claims] when they broadcast a performer’s entire act without his consent. The Constitution no more prevents a State from requiring [the station] to compensate [Zacchini] for broadcasting his act on television than it would privilege [the station] to film and broadcast a copyrighted dramatic work without liability to the copyright owner

Id.

¹⁹² MCCARTHY, *supra* note 149, at 67.

¹⁹³ *Zacchini*, 433 U.S. at 571 (distinguishing the Court’s privacy decision in *Time, Inc. v. Hill* because it “involved an entirely different tort from the ‘right of publicity’” at issue in *Zacchini*). In describing the importance of *Zacchini* to the right of publicity jurisprudence, McCarthy noted:

The *Zacchini* case involved only a small slice of the right of publicity and its holding was based on an unusual and narrow set of facts. However, the mere fact that the United States Supreme Court favorably mentioned the right of publicity was alone enough to attract attention and spark interest [in the new legal doctrine].

MCCARTHY, *supra* note 149, at 68–69.

¹⁹⁴ See MCCARTHY, *supra* note 149, at 74; RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46–49 (1995). The Restatement endorsed the view opposite of Prosser that the right of publicity should be considered as a doctrine apart from the right to privacy. See MCCARTHY, *supra* note 149, at 74. As Nimmer previously argued in his influential article, the Restatement “concludes that the right of publicity is an inherent right of all persons, both celebrities and non-celebrities.” *Id.* at 75.

¹⁹⁵ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

¹⁹⁶ See *id.* at § 47. As previously discussed, the right of publicity is a creature of state common and statutory law; thus, the Restatement’s formulation provides some

much discourse between scholars, judges, and practitioners.¹⁹⁷ The onset of the fantasy sports debate will undoubtedly provide ample opportunity for increased exploration of the right of publicity.

B. *Proving a Right of Publicity Violation*

An action for a violation of the right of publicity sounds in tort and is commonly referred to as an "unfair competition" claim.¹⁹⁸ Although each individual state's formulation may contain its own nuances, in general a *prima facie* case for right of publicity infringement requires the plaintiff to establish the following: (1) a valid and enforceable right in his or her identity or persona;¹⁹⁹ (2) that the defendant has infringed upon that right by impermissibly using some aspect of the identity or persona in such a way that plaintiff is identifiable from defendant's use;²⁰⁰ and (3) that such use by the defendant is likely to cause damage to the commercial value of that individual's persona.²⁰¹ It is not necessary to prove some quantifiable amount of damage in order to gain injunctive relief for a right of publicity violation; however, if the plaintiff's action demands the recovery of damages, some amount of actual commercial damage must be demonstrated.²⁰² If the plaintiff has met his or her *prima facie* case, the defendant may be able to

much needed uniform guidelines in the arena of right of publicity law. *See generally* McCarthy, *infra* note 267, at 141. Given the vast array of different state formulations for the right of publicity, many scholars have urged for a federal right of publicity statute in an effort to provide clearer guidance for individuals and practitioners. *See id.* The International Trademark Association has in the past unsuccessfully attempted to sponsor federal legislation governing the right of publicity. *Id.* at 141-42. Despite the overwhelming need for such legislation, to date there have been no federal bills passed regarding the right of publicity. *See id.* at 141.

¹⁹⁷ *See generally* MCCARTHY, *supra* note 149, at 76.

¹⁹⁸ *See id.* at 114; *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

¹⁹⁹ *See* MCCARTHY, *supra* note 149, at 114-15; *see also* Floyd A. Gibson & Rachel M. Healey, *The Right of Publicity Comes of Age*, 23 AIPLA Q.J. 361, 367 (1995).

²⁰⁰ MCCARTHY, *supra* note 149, at 114-15; *see also* McCarthy, *infra* note 267, at 135 (explaining that the "test for infringement is 'identifiability[,] [n]ot confusion as to endorsement by the person'"); Halpern, *supra* note 152, at 862 (quoting *White v. Samsung Elec. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992) ("It is not important how the defendant has appropriated the plaintiff's identity, but whether the defendant has done so.")).

²⁰¹ MCCARTHY, *supra* note 149, at 115; *see also* Halpern, *supra* note 152, at 863 ("[W]hatever the identifiers used, for the use to be . . . actionable . . . they must unequivocally identify the plaintiff; . . . 'their use [must] enable[] the defendant to appropriate the commercial value of the person's identity.'").

²⁰² *See* MCCARTHY, *supra* note 149, at 116.

escape liability for the infringement of the right of publicity by raising a number of affirmative defenses, including the First Amendment.²⁰³

C. *The First Amendment Defense to a Right of Publicity Claim*

There is an inherent and intractable tension between the right of publicity and the guarantees of the First Amendment²⁰⁴ because “[b]y its nature, the right of publicity implicates speech.”²⁰⁵ This tension has led many academics to conclude that the assertion of a First Amendment defense greatly complicates a right of publicity case by forcing the courts to delve into the black hole that has become freedom of speech jurisprudence.²⁰⁶ As with other areas of constitutional law, determining whether the First Amendment trumps the right of publicity in a particular case requires the court to engage in a balancing test between the societal values of free expression and an individual’s right to protect his or her persona.²⁰⁷ When confronted with a

²⁰³ See Gibson & Healey, *supra* note 199, at 377–79. Given the state-dependent nature of the right of publicity, the defenses available may vary; however, there are several general affirmative defenses available in virtually all right of publicity actions. *Id.* The two most common defenses to a right of publicity claim are consent and the First Amendment. See John McMillen & Rebecca Atkinson, *Artists and Athletes: Balancing the First Amendment and the Right of Publicity in Sport Celebrity Portraits*, 14 J. LEGAL ASPECTS SPORT 117, 122 (2004).

²⁰⁴ See *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 931 (6th Cir. 2001). At issue in *ETW* was whether Tiger Woods’s right of publicity was violated by an unauthorized painting of the golf phenom, complete with a notation regarding his victory at the Masters of Augusta. *Id.* The Sixth Circuit rejected Woods’s claim and found that the First Amendment rights of the artist outweighed Woods’s interest in his persona. *Id.* at 938. In the words of the court, “[T]he effect of limiting Woods’s right of publicity in this case is negligible and significantly outweighed by society’s interest in freedom of artistic expression.” *Id.*

²⁰⁵ Halpern, *supra* note 152, at 867.

²⁰⁶ See generally Stapleton & McMurphy, *supra* note 167, at 44. According to Professor McCarthy, “the rules governing the application of the First Amendment are often maddeningly vague and unpredictable. Even constitutional scholars admit this to be so.” MCCARTHY, *supra* note 149, 99; see also William W. Van Alstyne, *First Amendment Limitations on Recovery From the Press—An Extended Comment on “The Anderson Solution”* 25 WM. & MARY L. REV. 793, 818 (1984) (“There is today, for instance, no general first amendment test at all. Rather, there are merely congeries of tests A random walk through any modern casebook in constitutional law will discover the extent to which the first amendment has been fragmented and scattered virtually out of sight”).

²⁰⁷ See J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:41 (4th ed. 2005) [hereinafter MCCARTHY ON TRADEMARKS]; see also *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 972 (10th Cir. 1996) (employing a balancing test and determining that the free speech interests of a manufacturer of satirical trading cards outweighed the players’ rights of publicity).

First Amendment defense to a right of publicity claim, a mere finding that a defendant's conduct falls within the realm of the First Amendment does not grant immunity from liability for a violation of the right of publicity; rather, the characterization of the defendant's conduct as "free speech" only signals the starting point of a court's analysis.²⁰⁸

The first step in loading the scales for the balancing of rights requires a determination regarding the type of speech presented.²⁰⁹ For purposes of a right of publicity analysis, the defendant's activity will be regarded as either communicative or commercial speech.²¹⁰ Commercial speech is generally defined as "speech of any form that advertises a product or service for profit or for business purpose."²¹¹ In other words, commercial speech "does no more than propose a commercial transaction."²¹² Communicative speech is somewhat of an amalgam that is not readily definable; however, it is most commonly thought of as the expression of ideas and the reporting of information in the public interest for the purposes of enlightenment, education, and entertainment.²¹³

In the case of commercial speech, such as advertisements, the First Amendment interest is not nearly as weighty as when communicative speech is involved.²¹⁴ When a defendant uses a person's name in a product advertisement, "the first amendment hurdle is not so high."²¹⁵ Thus, it is

²⁰⁸ See MCCARTHY, *supra* note 149, 105. Professor McCarthy explains that the First Amendment does not automatically trump the assertion of any other rights because "[it] is not a monolithic, solid block of constitutional immunity from liability." *Id.*

²⁰⁹ *Id.*

²¹⁰ See MCCARTHY ON TRADEMARKS, *supra* note 207, at § 28:41.

²¹¹ JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.26, 1227 (7th ed. 2004). Given the imprecise nature of First Amendment law, this definition of commercial speech is a generalization rather than a black letter rule of law. *See id.* at 1227-28.

²¹² *Cardtoons*, 95 F.3d at 970; *see also* NOWAK & ROTUNDA, *supra* note 211, at 1231. *See* MCCARTHY, *supra* note 149, at 112. According to the Supreme Court, the fact that something is sold in the marketplace for economic gain does not mean that it qualifies as commercial speech. *See* Va. State Bd. of Pharmacy v. Va. Consumer Council, Inc., 425 U.S. 748, 761 (1976).

²¹³ *See generally* Pamela Edwards, *What's the Score?: Does the Right of Publicity Protect Professional Sports Leagues?*, 62 ALB. L. REV. 579, 610-12 (1998). Communicative speech has also been labeled as "newsworthy" speech, though such a label appears to exclude important types of communicative speech such as entertainment and parody. *Id.* at 612.

²¹⁴ *See* Gibson & Healey, *supra* note 199, at 380.

²¹⁵ *See* White v. Samsung Elec. Am., Inc., 971 F.2d 1395, 1401 n.3 (9th Cir. 1992). In *White*, an advertisement for Samsung videocassette recorders depicted a robot, designed to resemble Wheel of Fortune co-host Vanna White. *Id.* at 1396. The robot was placed beside a backdrop instantly recognizable as Wheel of Fortune's set, and the advertisement read "[l]ongest-running game show. 2012 A.D." *Id.* Following a right of

unlikely that the First Amendment will overshadow the person's right of publicity in such cases. However, the Supreme Court has held that the classification of an activity as communicative does not necessarily foreclose the possibility of the right of publicity prevailing over the First Amendment. In *Zacchini*, the Court held that, although communicative speech, a news station's broadcast of the plaintiff's entire performance without permission violated the right of publicity.²¹⁶ The Court believed that the time and effort that the entertainer expended in his performance outweighed the news station's First Amendment rights.²¹⁷ Exemplifying the intricate balance that must be struck when a First Amendment defense is raised in a right of publicity action, the Court explained that the station's conduct was undoubtedly protected by the First Amendment, but its protection was outweighed by the performer's right of publicity because the broadcast posed "a substantial threat to the economic value of that performance."²¹⁸

D. Analyzing the Right of Publicity in the Context of Fantasy Sports

Despite the possible copyright claims that could be raised in the fantasy sports controversy, the future of fantasy sports as they exist today likely hinges in large part upon the contours of the right of publicity.²¹⁹ The professional sports leagues have argued, and will likely continue to argue that by using player names and corresponding performance statistics the fantasy sports industry has infringed upon the players' rights of publicity.²²⁰ Given that the precise issue presented is one of first impression for the courts, there is a considerable amount of uncertainty regarding how the right of publicity principles will be applied in the context of the fantasy sports industry. The following sections of the Note present the arguments available for both the professional sports leagues and the fantasy industry, followed by

publicity claim by Vanna White against Samsung, the Ninth Circuit found a right of publicity violation and rejected the defendant's First Amendment claim because the advertisement was purely commercial in nature and meant to imply endorsement of Samsung's product. *Id.* at 1401.

²¹⁶ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575 (1977).

²¹⁷ *See id.*

²¹⁸ *Id.* at 575, 578. *Zacchini* demonstrates that even in circumstances where the speech is categorized as communicative, the First Amendment does not automatically trample any right of publicity claims. *See* MCCARTHY ON TRADEMARKS, *supra* note 207, at § 28:41.

²¹⁹ *See generally* Schwarz, *supra* note 16, at 22 (commenting that the fantasy sports industry should be more concerned about defending against right of publicity claims as opposed to those based upon copyright law).

²²⁰ *See generally* Memorandum in Support of Major League Baseball Players Association's Motion for Summary Judgment at 5, C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp.2d 1077 (E.D. Mo. 2006) (No. 45).

a proposal for how the controversy should be resolved under the existing right of publicity jurisprudence.

1. *The Arguments in Support of the Professional Leagues*

The professional leagues and/or their players associations²²¹ argue that by using player names and statistics without a license, the fantasy sports industry has infringed upon the players' rights of publicity.²²² In support of their contentions that a right of publicity violation has occurred, the professional leagues point to several key cases involving the intersection of professional sports and the right of publicity. Although none of these cases dealt directly with the fantasy sports industry, they involved analogous fact patterns that could pose a significant hurdle to the fantasy sports industry.

It is undisputed that all fantasy sports organizations use player identities and corresponding statistics in their offerings.²²³ Without the use of the names and statistical accomplishments, much of the allure of the billion dollar fantasy sports industry would be essentially eliminated.²²⁴ Based upon

²²¹ Because of the contractual agreements that exist between the individual players and their respective players associations, any right of publicity claims regarding player names and statistics would likely not be raised by the players themselves. See *Gridiron.com v. Nat'l Football League Players Ass'n.*, 106 F. Supp. 2d 1309, 1311 (S.D. Fla. 2000) (detailing the terms of the General Licensing Agreement that professional football players signed with the NFL Players Association, which assigned the players' rights of publicity to the Association). In some situations, such as professional baseball, the players union will then contractually assign the players' rights of publicity to the leagues. See *Hiestand*, *supra* note 18, at C12.

²²² See Memorandum in Support of Major League Baseball Players Association's Motion for Summary Judgment at 6, *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp.2d 1077 (E.D. Mo. 2006) (No. 45).

²²³ See Complaint at ¶¶ 9, 10, *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp.2d 1077 (E.D. Mo. 2006) (No. 1-1); see also CDM Fantasy Sports Homepage, <http://www.CDMsports.com> (last visited Oct. 11, 2006) (providing an example of how fantasy sports companies use player names and statistics in tandem in their games). Currently, some of the fantasy companies have obtained licenses from the leagues in response to threats like those made by Major League Baseball prior to the institution of the *C.B.C.* litigation. See *Goold*, *supra* note 45, at D1 (reporting on baseball's refusal to grant *C.B.C.* a fantasy license and the fact that other larger fantasy companies were in line to become MLB licensees). Despite the recent court ruling in *C.B.C.*, the issue is far from settled and many companies will certainly continue to pay large licensing fees, though the *C.B.C.* Court's reasoning suggest the fees are unwarranted.

²²⁴ See John Hunt, *Fantasy Debate Heating Up*, USA TODAY, Feb. 16, 2005, at C3. According to sports reporter John Hunt, if fantasy sports were forbidden from using player names, participants would be forced to draft "Minnesota 57" instead of pitcher "Johan Santana," who wears number fifty-seven for the Minnesota Twins. *Id.* Given that part of the attraction of fantasy sports is the ability to fill your team's roster with names

this fact, the professional leagues assert that the manner in which the names and statistics are used by fantasy sports is purely commercial.²²⁵ The first decision to explore is *Palmer v. Schonhorn Enterprises, Inc.*,²²⁶ which involved the unauthorized integration of the names and statistics of golf legend Arnold Palmer and other professional golfers into a game entitled "Pro-Am Golf."²²⁷

In *Palmer*, the names and professional accomplishments of the golfers were presented in "Profile and Playing Chart[s]" in an effort to improve the sales of the game.²²⁸ The court rejected the defendant's argument that the golfers could not maintain a right of publicity claim²²⁹ because both the golfers and the corresponding statistics contained on the profile sheets were generally available in newspapers and magazine articles.²³⁰ Central to the court's holding was a distinction between the pure reporting of an individual's statistics and the act of "capitalizing upon the name by using it in connection with a commercial project."²³¹ In the latter situation, the *Palmer* court believed it unjust to allow the producer of a game to freely exploit and profit from the successes of another "merely because the owner's accomplishments have been highly publicized."²³²

such as Alex Rodriguez, Jerome Bettis, LeBron James, and so on, requiring a license to list player names would lead to the demise of many smaller companies in the fantasy industry.

²²⁵ See Memorandum in Support of Major League Baseball Players Association's Motion for Summary Judgment at 5, C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp.2d 1077 (E.D. Mo. 2006) (No. 45). This position was accepted by the C.B.C. Court, although many believe baseball retains a strong argument. See C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp.2d 1077, 1092-95 (E.D. Mo. 2006).

²²⁶ *Palmer v. Schonhorn Enter., Inc.*, 232 A.2d 458, 458 (N.J. Super. Ct. 1967).

²²⁷ *Id.* at 459.

²²⁸ *Id.*

²²⁹ *Id.* at 462. Although the *Palmer* Court at times discusses the case in terms of the "right of privacy," the decision has been consistently treated as resting upon the right of publicity. See, e.g., Edwards, *supra* note 213, at 618-19 (referring to the *Palmer* case as a right of publicity decision).

²³⁰ *Palmer*, 232 A.2d at 462.

²³¹ *Id.* Distinguishing the profile sheets from biographies and newspaper articles, the court focused on the purely commercial aspect of the board game, stating: "While one who is a public figure or is presently newsworthy may be the proper subject of news or informative presentation, the privilege does not extend to commercialization of his personality through a form of treatment distinct from the dissemination of news or information." *Id.* at 461 (emphasis in original) (quoting *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485, 488 (N.Y. Ct. App. 1952)).

²³² *Id.* at 462. Elaborating on the irrelevance of the highly publicized nature of the athletes and the statistics, the court stated, "It is unfair that one should be permitted to commercialize or exploit or capitalize upon another's name, reputation or

Aside from *Palmer*, the professional leagues' argument that the use of player names and statistics in fantasy sports games violates the right of publicity receives support from the case of *Uhlaender v. Henricksen*.²³³ The issue in *Uhlaender* was the defendant's production of a board game containing player names and performance statistics of over 500 major league baseball players.²³⁴ Upset with the inclusion of the names and statistics in the game without permission or compensation, the Major League Baseball Players Association filed suit alleging a violation of state misappropriation law.²³⁵ Relying in part upon *Palmer*, the *Uhlaender* court concluded that the players had a right in their names and performance statistics that had been infringed upon by the defendant's board game.²³⁶

The professional leagues may also gain precedential support for their position from the holding in *Gridiron.com, Inc. v. National Football League, Players' Association, Inc.*²³⁷ Although *Gridiron.com* was decided as a matter of contract law, both the factual situation and dicta from the opinion bolster the leagues' right of publicity argument.²³⁸ In *Gridiron.com*, the developer of *Gridiron.com*, a website devoted to professional football and its players, secured licensing contracts with 150 NFL players authorizing the website to use their photographs in connection with its links to other websites and a fantasy football game.²³⁹ *Gridiron.com* was plastered with third-party advertisements from companies eager to have their brand associated with the

accomplishments merely because the owner's accomplishments have been highly publicized." *Id.*

²³³ *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1278 (D. Minn. 1970). According to the defendant's advertisement, "Players are rated in every phase of baseball play You manage 520 big time players. Your strategy affects the outcome of every game [The game] [c]an be played solitaire, or [in] leagues of 20" *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 1279–80. Although framed in terms of misappropriation, the claim was essentially treated by the court as a right of publicity action. *See id.* at 1281.

²³⁶ *Id.* at 1282–83. In reaching its decision, the *Uhlaender* Court rejected the defendant's argument that because the information utilized by the game was readily obtainable from the media the players could not claim a right of publicity violation. *Id.*

²³⁷ *Gridiron.com, Inc. v. Nat'l Football League, Players Ass'n, Inc.*, 106 F. Supp. 2d 1309, 1316 (S.D. Fla. 2000).

²³⁸ *See generally id.* at 1315. Although the controversy itself centered around whether the website had violated the exclusive licensing agreement that existed between the NFL Players Association and the players by gaining individual player permission to use their pictures on the website, the court addressed the right of publicity in rejecting the website's First Amendment claim. *See also* Survey, *Gridiron.com v. National Football League*, 5 INTELL. PROP. L. BULL. 41, 41 (2000) (providing a summary of the opinion, including a discussion of the right of publicity aspects of the case).

²³⁹ *Gridiron.com*, 106 F. Supp. 2d at 1313.

image of a premier football player.²⁴⁰ Upon learning of the activities of the website, the NFL Players Association issued cease and desist orders to Gridiron.com alleging that its activities violated the NFL Players Contract and Group Licensing Agreement.²⁴¹ In response to the cease and desist orders, Gridiron.com sought a declaratory judgment that its conduct did not violate the licensing agreement.²⁴² The court disposed of Gridiron.com's argument that a website was not a "product" under the agreement²⁴³ and held that the site was not entitled to First Amendment protection because it was purely commercial merchandise unlike "novels, movies, music, magazines and newspapers."²⁴⁴

In the fantasy debate, the professional leagues maintain that the manner in which the fantasy sports games employ player names and statistics is indistinguishable from their use in the table games struck down in *Palmer* and *Uhlaender*.²⁴⁵ The argument follows that just as the use of player names and statistics in the baseball simulation game in *Uhlaender* were central to the marketability of the product, fantasy sports depend entirely upon the incorporation of both player names and statistics. Because the ability to use player names and statistics together allows the fantasy industry to earn billions of dollars in revenue, the leagues will posit that the use is a purely commercial activity that goes beyond the mere reporting of statistical information.²⁴⁶ The leagues will likely point to *Gridiron.com* for the

²⁴⁰ *Id.*

²⁴¹ *Id.* at 1311. At the time of the cease and desist orders, ninety-seven percent of the active NFL players had signed the Group Licensing Agreement. *Id.* Under the terms of the agreement, the players' union held the exclusive licensing right to player names and likeness anytime that "a total of six (6) or more NFL player images [are used] in conjunction with or on products that are sold at retail or used as promotional or premium items." *Id.* Essentially, under the Group Licensing Agreement the players assigned their rights of publicity to the Players Association. *See id.* at 1316.

²⁴² *Id.* at 1311.

²⁴³ *Id.* at 1314. The court concluded that the website qualified as a product because it "aggregates information on football players and organizes the information for easy access." *Id.*

²⁴⁴ *Gridiron.com*, 106 F. Supp. 2d at 1315.

²⁴⁵ Memorandum in Support of Major League Baseball Players Association's Motion for Summary Judgment at 6, *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp.2d 1077 (E.D. Mo. 2006) (No. 45).

²⁴⁶ *See generally id.* at 8. A similar argument has been raised by the MLBPA in the *C.B.C.* case and will likely be a central portion of the MLB's forthcoming motion for summary judgment. *Id.*

propositions that a website constitutes a product²⁴⁷ and that the unauthorized use of players' personas on the site violates the right of publicity.²⁴⁸

Although clearly not central to the court's resolution of the dispute in *Gridiron.com*,²⁴⁹ the fact that the website in question linked individuals to a fantasy football game should be a focal point for the leagues throughout any litigation with the fantasy sports industry. The existence of *Palmer*, *Uhlaender*, and *Gridiron.com* lend support to the professional leagues; however, as detailed in the following section, the fantasy sports industry's position is also buttressed by significant authority and policy. Following an overview of the fantasy industry's position is a proposal on how the courts should apply the right of publicity doctrine to fantasy sports.

2. *The Arguments in Support of the Fantasy Sports Industry*

Given the potentially disastrous consequences of having the use of player names and statistics declared a right of publicity violation, the fantasy sports industry has a tremendous incentive to fiercely litigate against the professional leagues.²⁵⁰ Fortunately for fantasy sports, there are several strong arguments in support of the contention that their use does not infringe upon the rights of publicity of professional athletes. The first argument for the industry centers around the inability of the professional leagues to establish a prima facie case of right of publicity infringement. If the courts determine that a prima facie case has been proved, the fantasy industry will respond by raising an affirmative defense grounded in the First Amendment.

a. *Inability to Establish a Prima Facie Case*

In all likelihood, the fantasy industry will first attack the professional leagues' ability to establish a prima facie case of right of publicity infringement. To prove a prima facie case, the following elements must be

²⁴⁷ See *Gridiron.com*, 106 F. Supp. 2d at 1314 (explaining why the website amounted to a "product" under the Group Licensing Agreement).

²⁴⁸ *Id.* The MLBPA's motion for summary judgment stated that *Gridiron.com* was "on all fours" with the fantasy baseball controversy. Memorandum in Support of Major League Baseball Players Association's Motion for Summary Judgment at 8, C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, 443 F. Supp.2d 1077 (E.D. Mo. 2006) (No. 45). However, a review of the two situations suggests that such a strong label seems misplaced.

²⁴⁹ See *Gridiron.com*, 106 F. Supp. 2d at 1311, 1314 (mentioning, without any analysis, the existence of the fantasy game tangentially in describing the various links contained on *Gridiron.com*).

²⁵⁰ See Baldas, *supra* note 11, at 121 (reporting that if the courts rule in favor of the fantasy industry, the professional leagues would lose a significant amount of licensing revenue).

established: (1) a valid and enforceable right in the plaintiff's identity or persona;²⁵¹ (2) that the defendant has infringed upon that right by impermissibly using some aspect of the identity or persona in such a way that the plaintiff is identifiable from the defendant's use;²⁵² (3) that such use by the defendant is likely to cause damage to the commercial value of plaintiff's persona.²⁵³ Based upon the manner in which fantasy sports operate, elements (1) and (2) should be easily established by the leagues. However, the third element's requirement that there be damage to the commercial value of the athletes as a result of the use of player names and statistics by fantasy sports will likely face intense opposition by the fantasy industry. From the perspective of the industry, the tremendous popularity of fantasy sports has enhanced, rather than damaged, the athletes' commercial value in their personas. Unlike other instances where the courts have found damage to the commercial value of an athlete's persona, the fantasy industry's position is that the manner in which fantasy sports games are configured actually boosts the commercial worth of individual players by significantly heightening their name recognition nationwide.²⁵⁴

The Ninth Circuit's opinion in *Abdul-Jabbar v. General Motors Corp.*²⁵⁵ is illustrative of the normal right of publicity case where the unauthorized use of a player's name and accomplishments caused damage to the player's commercial value. In *Abdul-Jabbar*, basketball great Kareem Abdul-Jabbar sued General Motors for the unauthorized use of his name and athletic accomplishments in connection with a car advertisement that aired during the NCAA basketball tournament.²⁵⁶ In holding that Abdul-Jabbar's right of

²⁵¹ See MCCARTHY, *supra* note 149 at 114–15; see also Floyd A. Gibson & Rachel M. Healey, *The Right of Publicity Comes of Age*, 23 AIPLA Q.J. 361, 367 (1995).

²⁵² See MCCARTHY, *supra* note 149 at 114–15; see also McCarthy, *infra* note 267, at 135 (explaining that the “test of infringement is ‘identifiability.’” Not confusion as to endorsement by the person); Halpern, *supra* note 154, at 862 (“It is not important how the defendant has appropriated the plaintiff's identity, but *whether* the defendant has done so” (emphasis in original) (quoting *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9th Cir. 1992))).

²⁵³ See MCCARTHY, *supra* note 149, at 115; see also Halpern, *supra* note 154, at 863.

²⁵⁴ The fantasy sports craze has eliminated the geographical boundaries by which sports fans have historically developed an affinity for particular teams; instead, a fantasy participant in Cleveland may find himself rooting for an unknown rookie relief pitcher for the Florida Marlins that he drafted for his fantasy team. See generally Badenhausen, *supra* note 19, at 52 (reporting that fantasy sports provides an incentive for fans to take interest in teams and players they would otherwise never follow).

²⁵⁵ *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 416 (9th Cir. 1996).

²⁵⁶ *Id.* at 409. The advertisement at issue in *Abdul-Jabbar* was for an Oldsmobile Eighty-Eight automobile, and contained a disembodied voice asking, “Who holds the record for being voted the most outstanding player of th[e NCAA] tournament?” Text

publicity had been violated by the commercial, the Ninth Circuit stated that “[Abdul-Jabbar] was injured economically because the ad will make it difficult for him to endorse other automobiles”²⁵⁷ Central to the court’s holding was the existence of evidence that Abdul-Jabbar was damaged economically because by GM implying his endorsement of the Oldsmobile Eighty-Eight it would have been difficult for him to obtain advertisement contracts from other members of the automotive industry.²⁵⁸

The fantasy industry’s position is directly opposite to that of *Abdul-Jabbar* because the opportunities and notoriety of many players have been increased by their inclusion in fantasy games.²⁵⁹ The argument follows that this heightened interest in even the most mediocre of players from the most distant of cities leads fans to watch more sporting events, buy more sports magazines and memorabilia, travel to exhibition games to “scout” possible players, and provides an overall increase in the popularity of both the sport and its individual athletes.²⁶⁰ If the courts conclude that a *prima facie* case of

then appeared on the screen reading “Lew Alcindor [Abdul-Jabbar’s original name], UCLA, ‘67, ‘68, ‘69,” followed by the statement, “Has any car made the ‘Consumer Digest’s Best Buy’ list more than once? The Oldsmobile Eighty-Eight has.” *Id.*

²⁵⁷ *Id.* at 416.

²⁵⁸ *Id.*

²⁵⁹ See Memorandum in Support of C.B.C.’s Motion for Summary Judgment at 26, C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp.2d 1077 (E.D. Mo. 2006) (No. 74-1); see also *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 415 (Cal. Ct. App. 2001) (stating that the use of player statistics and accomplishments in videos and on Major League Baseball’s website likely enhanced the players’ marketability rather than detracting from it).

²⁶⁰ With nearly fifteen million people participating in fantasy sports and purchasing specialty television channels to keep their rosters up-to-date, the fantasy industry views itself as a force hugely responsible for the revitalization of baseball and the unprecedented success of the NFL. See Devin Gordon & Stephen Saito, *A Healthy Fantasy Life*, NEWSWEEK, Aug. 29, 2005, at 44 (“[Fantasy football] turns football fans into bigger football fans [F]antasy participants watch nearly three hours more football per week than non-fantasy viewers. They even watch Arizona Cardinals games.”); see also Hunt, *supra* note 224, at C3 (citing research from the University of Mississippi indicating that in the past three years growth in fantasy baseball has statistically outpaced that of fantasy football); Badenhausen, *supra* note 19, at 52 (“Fantasy players subscribe to satellite packages and watch games that no one else cares about.”).

Commenting on the benefit that fantasy sports have bestowed upon professional sports, fantasy founder Daniel Okrent stated: “Because of the nature of the fantasy game, the typical . . . participant pays close attention to games and players that he or she would not normally follow . . . [leading] to more talk about baseball and baseball players, which inevitably increases the popularity of the sport.” Aff. of Daniel Okrent, *quoted in* Memorandum in Support of C.B.C.’s Motion for Summary Judgment at 26, C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, 443 F. Supp.2d 1077 (E.D. Mo. 2006) (No. 74-1).

right of publicity infringement can be proven, the fantasy sports industry will be able to fall back upon a strong First Amendment defense.²⁶¹

b. *The First Amendment Defense*

Even if the courts find a *prima facie* violation of the right of publicity by the fantasy sports industry's use of player names and statistics, the First Amendment may provide a refuge for the fantasy industry's conduct. As previously discussed, when a First Amendment defense is raised to a right of publicity claim the court must engage in a balancing test to determine whether the individual's interest in his or her persona outweighs society's interest in free expression.²⁶² From the vantage point of the fantasy industry, the inclusion of player names and statistics on a website is communicative speech rather than the lesser favored commercial speech.²⁶³ In support of this analogy, the fantasy sports industry will argue that its posting of names and statistics is no different from the box scores and sports stories found in virtually every newspaper from coast-to-coast.

Ironically, the bulk of support for the fantasy sports industry's defense will come from *Gionfriddo v. Major League Baseball*,²⁶⁴ a case where Major League Baseball actually successfully asserted a First Amendment defense against a right of publicity claim asserted by former players. In *Gionfriddo*, a group of retired professional baseball players sued the league for its unauthorized use of the players' names, statistics, photographs, and other indicia of persona in television programs, video presentations, and on its website.²⁶⁵ Determining that the League's First Amendment rights superseded the players' rights of publicity, the *Gionfriddo* court held that by reporting the statistics and accomplishments of the players in various media formats, including on the internet, Major League Baseball was "simply

²⁶¹ See generally Memorandum in Support of C.B.C.'s Motion for Summary Judgment at 26, *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp.2d 1077 (E.D. Mo. 2006) (No. 74-1).

²⁶² See 4 THOMAS J. MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:41 (1996).

²⁶³ See Memorandum in Support of C.B.C.'s Motion for Summary Judgment at 10, *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp.2d 1077 (E.D. Mo. 2006) (No. 74-1). In the *C.B.C.* litigation, it has been argued that the fantasy game itself spawns a plethora of commentary and social discourse, which is clearly protected by the First Amendment. *Id.* An entire cottage industry has been created by way of fantasy magazines, television shows devoted to fantasy sports issues, and even books aimed at assisting the novice fantasy player. See *id.*; see generally HARMON, *supra* note 9, at 1 (discussing fantasy sports strategies).

²⁶⁴ *Gionfriddo*, 94 Cal. App. 4th at 404.

²⁶⁵ *Id.* at 406.

making historical facts available to the public through game programs, web sites and video clips.”²⁶⁶

Of particular relevance to the fantasy debate was the court’s statement that Major League Baseball’s conduct was subject to First Amendment protection despite the fact that it was not regarded as a member of the traditional news media.²⁶⁷ Even though the information posted on the website and included in the videos was designed to make a profit, the League’s communication of the information was not commercial speech because it did not “propose a commercial transaction.”²⁶⁸ Thus, as communicative speech, the League’s First Amendment right to report statistics and other information outweighed any interests of the players in the protection of their personas.²⁶⁹

Further bolstering the fantasy industry’s First Amendment defense is the *Gionfriddo* court’s statement that “as a baseball season unfolds, the First Amendment will protect mere recitations of the players’ accomplishments.”²⁷⁰ From the perspective of the fantasy industry, Major League Baseball’s use of player statistics on its website is indistinguishable from the manner in which the same information is incorporated into fantasy games.²⁷¹ The irony of the League’s statement and *Gionfriddo*’s holding will undoubtedly remain central in the fantasy sports industry’s defense against liability under the right of publicity.

E. A Proposal for Resolving the Right of Publicity Issues Involved in Fantasy Sports

Acknowledging the existence of strong legal arguments in support of both the fantasy sports industry and the professional leagues, along with the

²⁶⁶ *Id.* at 411.

²⁶⁷ See *id.* at 412 (rejecting as meritless the argument that only media entities are entitled to First Amendment protection); see also *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 574 (1977) (recognizing that “entertainment itself can be important news”); *Interactive Digital Software Ass’n v. St. Louis County, Mo.*, 329 F.3d 954, 958 (8th Cir. 2003) (holding that video games may warrant the same level of free speech protection as literature); J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM. J.L. & ARTS 129, 148 (1995) (noting that entertainment is speech entitled to First Amendment protection).

²⁶⁸ *Id.*; see also *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407 (9th Cir. 1996) (serving as an example of commercial speech because a player’s likeness was used to promote a commercial transaction: the sale of an automobile).

²⁶⁹ See *Gionfriddo*, 94 Cal. App. 4th at 411.

²⁷⁰ *Id.* at 410.

²⁷¹ See Memorandum in Support of C.B.C.’s Motion for Summary Judgment at 13, *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp.2d 1077 (E.D. Mo. 2006) (No. 74-1).

fact that the issue being presented is one for which there is neither case precedent nor in-depth scholarly discussion, it is submitted that the courts should reject any right of publicity claims by the leagues and find in favor of fantasy sports. The professional leagues have failed to amass the evidence required for a *prima facie* case of right of publicity infringement, and assuming *arguendo* that such a showing were made, the First Amendment rights of the fantasy industry outweigh any personal interests that the players have in their personas.

1. *Failure to Establish Damage to the Commercial Value of the Players*

As previously discussed, to establish a *prima facie* case of infringement, the professional leagues must prove damage to the commercial value of the athletes. The leagues cannot make the requisite showing because the overwhelming evidence demonstrates a strong correlation between the growth of the fantasy market and the popularity of professional sports.²⁷² As a result of fantasy sports, television viewership of games has increased and talk of professional athletics and their players dominates the lunchroom discourse in many corporations, student unions, and the living rooms of over fifteen million people.²⁷³ Additionally, the mechanics of the fantasy industry whereby a participant selects individual players, including unknowns and up-and-comers, greatly increases the national popularity of players whose careers would otherwise have gone unnoticed by the majority of sports fans.²⁷⁴ A story from NBA star Shane Battier illustrates the effect of fantasy sports upon the popularity of individual athletes: "I was in Hong Kong this past year and this guy came up to me and said, 'I had you on my fantasy team and you won me a lot of games this year.' So [fantasy sports] go[] all the way to Hong Kong, which is pretty cool."²⁷⁵ From this quote it is apparent that the athletes themselves have recognized what the leagues

²⁷² See Stark, *supra* note 10 (listing fantasy sports as one of the top twenty-five innovations in professional baseball); see also Ballard, *supra* note 1, at 80 (reporting that because of fantasy sports many fans have a stronger allegiance to players and the game).

²⁷³ See Gordon & Saito, *supra* note 260, at 44 (statistics indicate that fantasy participants watch three hours more of football per week than non-fantasy individuals); see also Tedeschi, *supra* note 2, at C7 (estimating that fantasy participants watch two additional hours of sports television per week).

²⁷⁴ See Ballard, *supra* note 1, at 80 (noting that because of fantasy sports "many fans now have a stronger allegiance to individual players").

²⁷⁵ See Graham Kendrick, *Fantasyland Lures Battier and Miller*, www.nba.com/grizzlies/features/feature-051011-fantasyland.html (last visited Oct. 11, 2006).

apparently have not: fantasy sports have increased their individual notoriety and the overall success of professional athletics.

Perhaps the greatest flaw in the professional leagues' argument that fantasy sports violate the *players'* rights of publicity is the fact that the *players themselves* are active fantasy participants.²⁷⁶ The likes of baseball players Curt Schilling and Derek Lowe, and basketball stars Tony Parker,²⁷⁷ Shane Battier, and Mike Miller,²⁷⁸ along with a number of other professional athletes, "have become hooked on fantasy sports."²⁷⁹ Obviously, if the players felt as though the commercial value of their persona was being damaged by fantasy sports it is unlikely they would be actively participating in such games and making guest appearances on programs devoted to the promotion of fantasy sports. Further supporting this assertion is the fact that athletes have historically closely regarded the value of their persona and would seem more likely to litigate rather than participate in any venture that they felt impaired their ability to generate revenue.²⁸⁰ Thus, it would be anomalous for a court to conclude that the value of an athlete's persona is damaged by an activity that he himself engages in and speaks glowingly of.²⁸¹

²⁷⁶ See *id.*

²⁷⁷ See *id.*

²⁷⁸ See *id.*

²⁷⁹ *Id.* Recognizing the connection between fantasy sports and the popularity of the underlying sport, Vancouver Grizzlies basketball player Brian Cardinal stated that: "You're trying to win games for the Grizzlies but at the same time you're trying to win games for people that have you on their fantasy teams." *Id.*

²⁸⁰ See, e.g., *Palmer v. Schonhorn Enter., Inc.*, 232 A.2d 458, 458 (N.J. Super. Ct. 1967) (featuring a golfer suing for unauthorized use of name and accomplishments); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1278 (D. Minn. 1970) (featuring professional baseball players suing for right of publicity violation); *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407 (9th Cir. 1996) (suing for unauthorized use of name and statistics in a commercial); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 919 (6th Cir. 2003) (featuring a golfer suing for unauthorized use of his image); *Vinci v. Am. Can Co.*, 591 N.E.2d 793, 793 (Ohio Ct. App. 1990) (featuring an Olympian claiming right of publicity violation for use of his name and statistics); *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 406 (Cal. Ct. App. 2001) (featuring retired players claiming right of publicity violation for use of name on website and other multimedia materials); *Twist v. TCI Cablevision*, 110 S.W.3d 363, 365 (Mo. 2003) (ruling on a suit by professional hockey player claiming right of publicity violation in use of his likeness in a comic book); *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639, 640 (1995) (featuring a quarterback suing over use of his image and accomplishments in connection with the sale of a commemorative newspaper); *Namath v. Sports Illustrated*, 363 N.Y.S.2d 276, 277 (1975) (involving a right of publicity claim arising out of the inclusion of quarterback's photograph in an advertisement for magazine subscriptions).

²⁸¹ Although the right of publicity claims against fantasy sports would likely be raised by the professional leagues and/or their players associations rather than the

Unlike *Abdul-Jabbar*, where the plaintiff demonstrated that his ability to endorse other automobiles was damaged by the unauthorized use of his persona, the inclusion of player names and statistics in fantasy games has actually enhanced the ability of players to gain endorsement deals because of the increased interest in professional sports and individual athletes. Although the leagues may claim to have suffered damages by way of lost licensing fees, speaking metaphorically, such an argument “puts the cart before the horse” and serves only to beg the question of whether they are entitled to extract any licensing fees from fantasy purveyors in the first place. To prove a *prima facie* case of right of publicity infringement (and therefore be permitted to require licensing) the leagues must be able to prove damage to the commercial value of the players’ personas as a result of fantasy sports; this cannot be established by merely pointing to lost licensing fees as a damage.

2. *The First Amendment Outweighs the Right of Publicity*

Even if the leagues can successfully establish a *prima facie* case of infringement against the fantasy sports industry, the industry’s First Amendment rights outweigh the personal interests protected by the right of publicity. Looking to the first step of the balancing test required in First Amendment cases, the use of player names and statistics in fantasy sports should be viewed as communicative speech,²⁸² entitling it to heightened protection. Although not “news” or “press” in the common meaning of those terms, fantasy sports constitute the type of entertainment that the Supreme Court has expressly cloaked with First Amendment protection.²⁸³ The manner in which the fantasy sports companies provide sports statistics in connection with player names in many respects mirrors the format of box scores that have appeared in newspapers and magazines throughout history.²⁸⁴

individual players, the analysis remains unchanged because these organizations would be asserting violations of the players’ rights of publicity.

²⁸² The conduct of the fantasy industry should not be viewed as commercial speech because it does not “propose a commercial transaction” or advertise any product. See NOWAK & ROTUNDA, *supra* note 211, at 1231.

²⁸³ See generally *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981) (holding that entertainment warrants First Amendment protection). Likewise, the fact that the fantasy industry is for-profit does not lead to the conclusion that it is commercial speech. See *ETW Corp.*, 332 F.3d at 931 (protecting speech even though it was sold for profit).

²⁸⁴ See Memorandum in Support of C.B.C.’s Motion for Summary Judgment at 10, C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp.2d 1077 (E.D. Mo. 2006) (No. 74-1) (stating that if fantasy sports’ use of statistics

The principle that the reporting of historical facts such as player statistics is shielded from the right of publicity by the First Amendment has been recognized by the courts and Major League Baseball itself.²⁸⁵ Given the factual similarities, the *Gionfriddo* holding is particularly instructive in the fantasy sports controversy. As with the presentation of player statistics in *Gionfriddo*,²⁸⁶ the issue in the context of fantasy sports is whether the fantasy industry's inclusion of player names and statistics in profit generating websites violates the right of publicity. Weighing the interests as was done in *Gionfriddo*, the players' rights of publicity are outweighed by the fantasy industry's First Amendment right to present historical information and biographical facts in a manner designed to entertain millions of Americans. In the words of Professor Thomas McCarthy, an eminent right of publicity scholar, if a piece of multimedia information is "history, then the First Amendment controls and the multimedia producer would usually not need a license from those whose life and accomplishments are reported."²⁸⁷

Despite the professional leagues' arguments to the contrary, the existence of *Palmer v. Schonhorn* and *Uhlaender v. Henricksen* should not be afforded much weight in the context of fantasy sports litigation.²⁸⁸ Both *Palmer* and *Uhlaender* were decided nearly forty years ago without any reference to the First Amendment balancing later endorsed by the Supreme Court in *Zacchini v. Scripps-Howard* and its progeny.²⁸⁹ The outdated nature of both *Palmer* and *Uhlaender* in light of the continued development of the right of publicity jurisprudence is best illustrated by both courts' reasoning that infringement occurs when a company uses player names and statistics "for the purpose of capitalizing upon the name by using it in connection with a commercial project other than the dissemination of news or articles or biographies."²⁹⁰

violates the right of publicity, then the reporting of the same statistics by newspapers would be in jeopardy).

²⁸⁵ See *id.*

²⁸⁶ See *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 411 (Cal. Ct. App. 2001).

²⁸⁷ J. Thomas McCarthy, *supra* note 267 at 148; see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995) (stating that a "person's identity in news reporting, commentary, [or] entertainment" does not typically constitute a right of publicity violation).

²⁸⁸ Likewise, *Gridiron.com v. National Football League* is inapplicable as it was decided on contract interpretation grounds and contained no discussion of the balancing necessary when the right of publicity collides with the First Amendment.

²⁸⁹ See Memorandum in Support of C.B.C.'s Motion for Summary Judgment at 14, *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp.2d 1077 (E.D. Mo. 2006) (No. 74-1) (distinguishing *Palmer* and *Uhlaender* from the fantasy controversy).

²⁹⁰ *Palmer v. Schonhorn*, 232 A.2d 458, 462 (N.J. Super. Ct. 1967); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970).

Not only does the language of these opinions limit their own application in today's technological world, but they are further undermined by several recent cases that have refused to find right of publicity violations despite the fact that the names and accomplishments of individuals were used for the purpose of commercial gain in projects other than literature.²⁹¹

Fantasy sports use player names and statistics in essentially the same manner as countless media enterprises nationwide. If the First Amendment does not protect the conduct of fantasy sports, then box scores, game reports, and a variety of other activities related to sports are placed in jeopardy by an individual's personal right of publicity. At their core, fantasy sports are a combination of history, entertainment, and business ingenuity that currently provides the impetus for much social commentary and technological innovation that should not be stifled by the right of publicity.

V. CONCLUSION

Whether you adore the industry or view it with disdain, the reality is that fantasy sports have become an integral part of American popular culture. Aside from shocking the most ardent of critics, the incredible rise of fantasy sports from a friendly game amongst eleven close associates to a highly competitive multi-billion dollar enterprise has created a number of complex and currently unresolved intellectual property law issues. Both copyright law and the right of publicity doctrines are implicated and challenged by the fantasy sports controversy. Although it is submitted that the fantasy sports industry should prevail on both accounts, the high stakes nature of the dispute and the novelty of the legal issues involved require further scholarly exploration. Despite the resolution of the *C.B.C. Distribution* case at the trial court level, all indications are that fantasy sports and intellectual property

²⁹¹ See *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 931 (6th Cir. 2003) (finding no right of publicity violation in defendant's painting of Tiger Woods and his accomplishments); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 962 (10th Cir. 1996) (holding that the defendant's use of player names and statistics in its trading cards did not violate the right of publicity of the athletes); *Vinci v. Am. Can Co.*, 591 N.E.2d 793, 794 (Ohio Ct. App. 1990) (finding that defendant's use of an Olympian's name and accomplishments in a line of Dixie Cups did not violate the right of publicity). Further highlighting the failure of the *Palmer* Court to consider the First Amendment implications inherent in right of publicity cases is its clearly erroneous statement that "a person is entitled to relief when his name has been used without his consent, either to advertise . . . or to enhance the sale of an article." *Palmer*, 232 A.2d at 461. Based upon current precedent, such an individual would only be entitled to relief if his name had been used without consent *and* the use was not outweighed by the First Amendment. See generally *Zacchini v. Scripps-Howard Broad., Inc.*, 433 U.S. 562, 575 (1977).

law will continue to collide, perhaps until intervention by the Supreme Court of the United States.²⁹²

²⁹² See Associated Press, *supra* note 23 (reporting that the *C.B.C.* litigation could merit eventual consideration by the Supreme Court); see also Associated Press, *MLB Says It Will Appeal Fantasy Baseball Ruling*, ESPN.COM, Aug. 9, 2006, <http://sports.espn.go.com/mlb/news/story?id=2544949> (reporting that Major League Baseball will appeal the district court's ruling in the *C.B.C.* case).